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THE PROFESSIONAL EMPLOYEE IN GOVERNMENT

A Report to the Honorable Murray Elston

Chairman

Management Board of Cabinet

Government of Ontario

on the

Appropriate Methods for Establishing
Salaries and Employment Conditions
for Professional Employees of the
Government of Ontario

submitted by

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I. INTRODUCTION

On March 26, 1987, the Government of Ontario appointed me Special Advisor to the Chairman of the Management Board of Cabinet to review, report on and recommend appropriate methods for establishing the compensation levels, employee benefits and other terms of employment for professional public servants who are employed by the Government under the Public Service Act. The particular focus of this review are five groups of licensed professional employees--the doctors, lawyers, dentists, engineers and architects--who are not now entitled to engage in collective bargaining with the government under the Crown Employees Collective Bargaining Act (CECBA). In the succeeding months through July, I met with individuals from and representatives of these several professional employee groups, together with officials from the interested government ministries and other affected bodies. Following these initial discussions, the parties prepared detailed analyses of their concerns and proposals, which were circulated to the other participants in this review. On the basis of this extensive documentation of the issues, I had a second series of meetings with the parties, and also with several of the Ministers having special responsibility for professional employees. I now submit this Report with my review of the current problems and my recommendations for change.

II. THE LEGAL SETTING

In their briefs prepared in connection with this inquiry, the parties developed a voluminous record of how the status of licensed professional employees has evolved to the current situation within the public service of Ontario. That work was an indispensable basis for informed recommendations on my part, and this material will also be available to inform the judgments of those in government who will ultimately decide what steps will be taken. However, it is not necessary to burden this Report with lengthy and detailed repetition of these historical accounts. Thus, I shall include here just a summary of the essential features of this changing situation, sufficient to make it clear what and why I am recommending.

The licensed professionals who are the prime focus of this review are employed by the Ontario government on terms and conditions of employment established within the framework of the Public Service Act. As is true of the government work force generally, such professional employees may have classified civil service status--in which case their employment terms are prescribed by the Civil Service Commission--or they may be unclassified ministerial appointments--in which case their employment terms are set in individual contracts (which generally track the salaries and benefits enjoyed by comparable classified employees).

However, for the last fifteen years the bulk of Ontario government employees have been entitled under CECBA to bargain collectively with the government regarding a broad range of salaries, benefits and conditions. Under this legislation the Ontario Public Service Employees Union (OPSEU) represents some 65,000 classified and unclassified members in a single all-employee bargaining unit; which in turn is subdivided into nine categories for purposes of separate salary negotiations. One of these components--the Scientific and Professional category--contains some 4,300 members whose larger occupational groups include the nurses (over 1,900 in all), social workers (500), biologists (160), economists (140), psychologists (100), and so on.

However, CECBA explicitly excludes from its coverage anyone "who is a member of the architectural, dental, engineering, legal and medical professions entitled to practice in Ontario and employed in a professional category" (S.1 (1)(f)(iv)). That means that the engineers (about 800), lawyers (nearly 650), doctors (250), architects (30) and dentists (25) employed by the Ontario government do not have the legal right to union representation and collective bargaining to shape and influence their terms of employment. That exclusion from the Act stems simply from their professional status, and applies whether or not the job duties of the individuals in question put their employment in a "managerial or confidential capacity" as defined by S.1 (1)(l) of CECBA.

These five licensed professional categories are often referred to in the literature on this subject as the "prototype professions" to distinguish them from the variety of newer professional and scientific occupations which have emerged into prominence in recent decades. Historically, these prototype professionals tended not to engage in collective bargaining, and post-war Canadian labor law reflected that phenonemon by excluding these groups from statutory coverage. However, as is evidenced by the review of the current legislation across the country in Appendix A to this report, Ontario's CECBA is the only present-day public sector statute which continues to deny all these prototype professionals the right to union representation.

The current Canadian treatment of professional bargaining ranges across these different positions:

(i). Ontario excludes all five professional categories from its CECBA, the legislation covering provincial government employees, but does permit engineers to enjoy collective bargaining rights in a unit of their own under the Labor Relations Act which covers the private and the rest of the provincial public sector. There are a couple of certified engineer units in Ontario, but the most important potential use of this provision is now the subject of an application for certification on behalf of the several thousand engineers employed by Ontario Hydro.

(ii). While in form Alberta does permit all these professional government employees to elect to bargain through the single provincial employee bargaining agent, in practice none of these professional groups wants to be included in that all-employee unit, and thus none of them now have collective bargaining. Prince Edward Island, on the other hand, simply includes these professionals in its overall bargaining unit--with the exception of the lawyers in the Department of Justice--and thus these employees do have union representation from the Prince Edward Island Public Service Association.

(iii). Newfoundland and Nova Scotia permit and have separate collective bargaining for government engineers and architects, but not for doctors, lawyers or dentists.

(iv). British Columbia allows collective bargaining by its engineers, architects and dentists who participate in a single all-professional employee unit, separate and distinct from both the nurses who also have their own unit, and the rest of the provincial employees who are represented by the BC Government Employees Union. While both doctors and lawyers are excluded from this legislation, the provincial government does voluntarily negotiate with the BC Medical Association in respect of its doctor-employee.

(v). The Federal Government, Quebec and New Brunswick provide for collective bargaining rights for all government professionals with the exception of the lawyers (at least those who work for the Department of Justice or the Attorney-General). Collective bargaining for the other four prototype professionals is conducted either in separate units for each group (as under federal law and in New Brunswick) or in a single scientific and professional component (as in Quebec). In New Brunswick the doctors and dentists which have such a right to collective bargaining have not yet chosen to exercise it.

(vi). As for Saskatchewan and Manitoba, on the face of their respective statutes no professional groups are excluded from collective bargaining rights. However, by agreement of the Saskatchewan government and its Government Employees Association, doctors, lawyers, engineers and dentists are excluded from the single provincial government employee unit. In Manitoba, while architects and dentists are covered by the master all-employee contract, engineers, doctors and lawyers have the right to certification in a unit of their own. Engineers and doctors have exercised that right, with the Manitoba Medical Association being the bargaining agent for the doctors. The lawyers do not have a certified bargaining representative, but they do have a

staff association which voluntarily negotiates salaries and benefits with the government.

Thus when one situates the Ontario law within that broader Canadian picture, it remains true that CECBA is the only statute which excludes all five of these prototype professionals from bargaining with their government employer. But when one focuses on specific professional categories--particularly the doctors and lawyers who are the major groups which stimulated this review of the Ontario scene--it is also true that Crown prosecutors are denied bargaining rights in every jurisdiction but one (that being Manitoba where the present relationship actually rests on agreement, not legislation), and doctors do not have bargaining rights in six of the other jurisdictions, and have not elected to exercise such a right in a seventh province, New Brunswick (though doctors have been extended voluntary negotiations in British Columbia, which excludes them on the face of its legislation).

III. THE PARTIES AND THEIR POSITIONS

As we have observed in some Canadian jurisdictions, the fact that a group of professional employees does not enjoy under Ontario law the right to union representation and collective bargaining does not preclude their organizing and securing on a voluntary base some such relationship with their government employer. In fact, there has been a considerable degree of activity among at least some of the prototype professionals in the Ontario public service. Indeed, I am struck by the manner in which the variety of positions now occupied by these Ontario professionals mirrors the evolution of employment generally over the last fifty years--from a situation under which the individual employee simply accepts the terms offered by the employer to a process of collective employee organization and influence over these terms.

(a). Medical Staff

Farthest along that trajectory are the 280 or so psychiatrists, other medical doctors and dentists who work in the province's psychiatric hospitals and mental retardation facilities (many of them employed in the classified civil service, but the majority unclassified and under contract). As far back as 1973, these professionals had organized themselves into a Psychiatric Hospitals Medical Staff Association which dealt informally with the ministries who were operating these facilities. Eventually, in 1980 a formal framework agreement was adopted creating a

Joint Negotiation Committee with equal representation from the Association and the Ministries affected (including one from the Civil Service Commission). This document provided for negotiations about salaries as well as consideration of vacation and other benefits. In the event of disagreement within the Committee, a fact-finding procedure was established with authority to make recommendations just with respect to salaries.

After several years experience with the procedure, the Association became disenchanted with the dispute resolution mechanism--both its narrow compass and its non-binding character. Feeding that sense of grievance were two factors. One was the fact that government physician earnings appeared to be falling significantly behind those of doctors in private practice, who were represented by the Ontario Medical Association in collective negotiations about the OHIP fee schedule. As well, to the extent that the government asserted that the appropriate comparison was with other employees in the public service, the Association members observed that every other occupational group working in the public psychiatric facilities enjoyed full-scale collective bargaining, ending in binding arbitration, about the broad spectrum of salaries, benefits and working conditions. That was true not just of the non-professional hospital employees, but also the registered nurses and even the medical interns and residents (the latter under a voluntary framework agreement secured by the Professional

Association of Interns and Residents of Ontario--PAIRO). And indeed the psychiatrists who worked for the federal government institutions inside Ontario also enjoyed comparable rights to interest arbitration under the federal Public Service Staff Relations Act. As a result, the Association began limited job action in these hospital facilities in early 1986, until on the eve of a full-scale walkout an agreement was reached to establish a tripartite Board of Conciliation chaired by Kevin Burkett which would consider and make recommendations not just on the issues of salaries and working conditions, but also about the "mechanism for addressing workplace issues" with these medical staff.

As I write this Report, the Burkett Board has not issued its recommendations on the doctors' substantive terms of employment. However, in late November 1986 that Board did report on the so-called "process issues" (see Appendix B). Burkett essentially accepted the Association position that there should be collective bargaining between the Government and the Association, the latter representing a unit of medical staff in these hospitals (perhaps also including the small number of doctors employed in non-clinical roles in other areas of the government). Negotiations should be conducted about the entire array of bargainable items specified in CECBA for other government employees. Most important from the Association's perspective, Burkett recommended final and binding

arbitration as the mechanism for resolving any deadlock in the negotiations.

Throughout these Conciliation Board proceedings, it was known that the government had been conducting its own interministerial analysis of the issue of collective bargaining for all the prototype professionals. That exercise culminated in the decision to appoint me as Special Advisor for this more public review, a decision which was made in the spring of 1987 some time after the Burkett award. The Association objected strongly to what it considered to be the government effort to avoid Burkett's recommendations. However, it did participate in this review at least to the extent of insisting emphatically upon the key Burkett proposals: collective bargaining by the government with an Association representing a unit limited to doctors and dentists; negotiations about a broad range of salaries, benefits and working conditions; with binding arbitration as the favored method of resolving bargaining impasses.

(b). Crown Attorneys

Thus these government doctors do now enjoy a form of union representation and collective negotiation about their salaries and working conditions, although they do not have access to binding arbitration as they would like. By contrast, while Ontario crown attorneys have also developed an organized association, they have never been able to

engage in meaningful negotiations with the provincial government about even their salaries.

Roughly 330 crown attorneys work for the provincial government in one capacity or another. Most are located in the county or district crown offices, which have anywhere from one or two to fifteen or twenty lawyers. However, about seventy-five crowns work on special prosecutions, appeals and policy and development work in the criminal division of the Attorney-General's headquarters in downtown Toronto.

A Crown Attorney Association was formed back in the 60's, initially for professional and social purposes. However, in the 70's the Association began to focus some of its attention upon the salaries and employment conditions of its members. Perhaps the major step in that direction was the Association's commissioning and paying for a salary study by Peat Marwick, a management consulting firm. That 1981 report documented a considerable erosion of crown attorney earnings, not just vis-a-vis the private practitioner, but also by comparison with lawyers employed by other governments (federal and municipal), the county and provincial court judges, and others working in the criminal justice system.

The Attorney-General of the day did acknowledge the validity of the Peat Marwick findings and the need for a substantial "catch-up" increase for the crown staff. However, the government brought in a general pay restraint

program before any such special adjustments could be made. Feelings of discontent continued to simmer and grow, and thus in 1986 the Association and the Attorney-General jointly sponsored a second study of compensation trends since 1981. This Sibson Report concluded that the situation had not improved, that substantial salary increases were required, and also that "a mechanism should be established by which the Crown Attorneys may have ongoing input into the determination of compensation adjustments". Not long thereafter, the current government initiated my inquiry into the shape which any such mechanism might take.

Like the psychiatrists, the crown attorneys view themselves as at the front line of a vital area of professional service--performing on behalf of the public essentially the same counsel function as do the better-paid private practitioners for their clients. Crown attorneys also observe that just about everyone else in the criminal justice system now enjoys the right to some form of collective salary negotiations with government, including neutral intervention if that is needed. That is true of the court staff represented by OPSEU under CECBA, of both the municipal and provincial police with their own associations and binding arbitration, and the Legal Aid lawyers who now have bargaining and fact-finding regarding their fee schedules. Even the provincial court judges have been given equal representation on a Provincial Court Commission whose role it is to recommend improvements in judicial "allowances

and benefits" to the Chairman of Management Board, and thence to the Standing Legislative Committee on the Administration of Justice--which recommendations the government has explicitly undertaken "will be given the fullest consideration and very great weight in the decision-making process". By contrast, the Crown Attorney Association has been able to do no more than sit down informally with the Attorney-General to discuss its salary problem and receive a sympathetic ear. However, the Association has not been able to get to the negotiating table with the human resources officials within Management Board, the people who actually exercise the major responsibility for the government's salary policies and decisions.

Given this perception of their problem, the crown attorney prescription followed quite naturally. Ideally, they would like an amendment to the Crown Attorney Act which would entitle their Association to negotiate salaries and other terms of employment with someone in government who has the power to make an agreement (whether that be the Attorney-General or Management Board). And in the absence of such agreement, the final step in the process would be binding tripartite arbitration of the issues in dispute.

(c). Civil Lawyers

Unlike their counterparts on the criminal law side, the 300 or more civil lawyers employed by the government have never even had an association of their own to speak on their behalf about salaries and related matters. To some extent this lack of organization reflects the fact that only about one-third of these lawyers actually work within the Attorney-General department itself. While the others are formally employed by this Ministry, they are seconded to and actually work in one of the many government departments and commissions which need ongoing legal work and advice.

But even though they are scattered throughout the entire government, these civil lawyers feel essentially the same concerns as do the crown attorneys. They also are engaged in important civil, administrative and constitutional litigation (and also prosecutions under provincial safety, environmental and other such legislation), or they perform solicitor's work regarding the government's property or contracts, or they draft legislation or help in policy development. However, civil lawyer salaries, which are governed by essentially the same framework as the crowns', are also falling significantly behind the earnings of the private sector attorneys with whom the civil lawyers regularly deal. In addition, the actual administration of this salary system in individual cases is mystifying and unpredictable to the recipients, and

a variety of working conditions are felt to be inadequate to the lawyer's professional responsibilities.

In the result, the initiation of my inquiry occasioned a sustained collective effort on the part of these lawyers to try to improve their situation. A new Civil Lawyers Association was formed, meetings were held, counsel was hired, a program was developed, and a brief written and discussed in meetings with me. The civil lawyers' position did differ in significant respects from that of the psychiatrists and the crown attorneys--perhaps reflecting the fact that much of this civil law group sees itself in an ongoing collegial relationship with the senior management and policy teams of the ministries within which they work.

Thus, the civil lawyers would like to see established on a firm legal footing their right to a collective voice and influence over salaries and other conditions of employment. However, the specific procedures through which that voice would be expressed should be shaped and developed through a more consensual format. Voluntary agreements would be arrived at which specified the appropriate professional groups and ministerial counterparts and enumerated the range of matters that could appropriately be discussed between them--without these arrangements having to be confined to the CECBA statutory mold. That would give a more flexible, pluralist cast to the several relationships, tailored to the specific needs and concerns of different professional constituencies and government operations.

However, just as was true of the psychiatrists and the crown attorneys, it is vital to the Civil Law Association to secure some kind of final and binding arbitration mechanism for resolving disputes about salary levels.

(d). Engineers and Architects

By contrast to both the civil and criminal lawyers, and also the doctors and dentists, the engineers and architects employed by the provincial government do not have an association of their own even to develop a position for this inquiry, let alone represent them in dealings with their government employer. I did make contact with and speak with several individual engineers and architects to learn something of their feelings about the current situation. Unlike the lawyers and doctors, I did not hear complaints of a wide gap between engineering and architect salaries in the government service and the average earnings of their counterparts in private practice. While I did learn of a number of economic and professional concerns felt by these two professional groups, apparently they are not so profound as to have sparked any organization of the membership to press for group action.

That might be considered a rather striking fact given the considerable history of organization of, and collective negotiation by, professional engineers. Indeed, engineers have had the longest-lived and widest-ranging experience with union representation of any of these prototype professionals in this country. The vast majority of

engineers work as employees, most in settings which are conducive to collective activity: i.e., where there is a sizeable number of professionals employed by a large bureaucratic, non-professional enterprise (whether public or private).

In Ontario, the prime example is the Society of Ontario Hydro Professional and Administrative Employees (the Society), which represents some 6,500 professional engineers and middle or lower-echelon managers at the Ontario Hydro. The Society is the largest member of the Federation of Engineering and Scientific Associations (FESA), an umbrella grouping of all the Canadian organizations which represent engineers in their dealings with employers. And in fact there was a time in the late 70's when the Ontario government engineers did organize a Government of Ontario Professional Employees Group (GOPEG) which, along with FESA and the Hydro Society, pressed the provincial government for changes in its labor laws which would facilitate collective bargaining by licensed professionals in both the public and the private sectors. When nothing materialized by way of legislation, GOPEG soon faded away. But that experience does suggest that if a new policy were to emerge in response to the current efforts of the government-employed doctors and lawyers, it is reasonable to suppose that the 800 or so engineers working for the provincial government would also organize to take advantage of that policy (though I am not so sure about the small and scattered group of 30 government

architects whose profession has had little experience with such collective action).

In any event, given this background I did have meetings with and received written submissions from both FESA and the Hydro Society. These bodies were best able to appreciate and to express the likely position of government engineers about the ideal mode through which this profession might deal with their employer. Just as important, the Hydro Society is the most revealing case study of actual Ontario experience with collective employee activity by any of these prototype professions. The relationship between Ontario Hydro and the Society stretches back forty years, and has grown in scope and sophistication during these decades (though, as we shall see, it has now encountered some difficulties). The two bodies are parties to a Master Agreement that provides for negotiation through a Joint Society-Management Committee (JSMC), which has equal representation from both sides and a full-time secretariat to facilitate their dealings. The JSMC meets regularly to review and discuss a broad range of employment and professional concerns of both sides. The aim is to formulate jointly-agreed to recommendations for adoption by Hydro's senior management committee, an aim which is realized more often than not. Of course, a priority within the JSMC is the negotiation of salaries, benefits and working conditions for this group of Hydro employees. If the JSMC is deadlocked on any or all of these issues,

recourse is had either to fact-finding (i.e., mediation with recommendations), or to binding arbitration about salaries and specific salary-related items.

In the last couple of years, the Society has become disenchanted with some aspects of the JSMC--not so much with what has been achieved, but rather the limitations upon the process. The Society worries that the JSMC rests not on statutory entitlement but on voluntary agreement by Ontario Hydro, an agreement which the employer can and has revoked. As well, the Society has recourse to a final and binding procedure only with respect to salaries, not the variety of other subjects which concern the engineers. These and other factors have led to a Society application for certification under the Labor Relations Act which, as I stated earlier, covers engineers, the only one of the prototype professionals which it now does. In that OLRB proceeding, the Society has encountered a number of difficulties--most prominently, the designation by Hydro of several thousand of the Society's present constituents as managers or supervisors who would be excluded from union representation. And, of course, under the Labor Relations Act employees must strike about any bargaining deadlocks, and would not be entitled to binding arbitration even about salaries.

This experience has given added urgency to the position of both the Society and the FESA about the changes they have pressed government to make in both CECBA and the Labor Relations Act:

(i). No professions should be excluded on that account from the basic right of all employees to collective bargaining with their employer, whether the latter be a public or private entity.

(ii). Professional employees should be entitled to bargain within a unit confined to their own professional group unless the latter chooses to be part of a broader constituency.

(iii). There should be a much narrower definition of those management employees who are excluded from labor legislation and collective bargaining; with the employer's concern about managerial loyalty and conflicts of interest being accommodated through the creation of separate bargaining units and representation.

(iv). Professionals should have access to binding arbitration on all disputed employment issues, so that there would be no need to face the ethical and economic concerns of strike action.

(e). Registered Nurses

The Hydro and the Society were not the only parties outside the prototype professional employees of the provincial government to take an active interest in my review. The Ontario Nurses Association (ONA) also met with me and prepared a brief setting forth what it believed should be the rights of the registered nurses now working for the government.

ONA represents nurses in hospitals throughout the province. In its view, registered nurses closely resemble doctors in having both post-secondary education and training and a self-governing College of Nurses which licenses, monitors and disciplines its members to ensure quality of nursing care for patients. Under the Labor Relations Act which applies to acute and extended care hospitals in the province, nurses have been recognized as having a distinct professional community of interest which entitles them to a separate bargaining unit and union representation by ONA or another union of the nurses' choosing. ONA advances not only the economic interests of nurses, but also their professional concerns--e.g., through the negotiation in the standard hospital agreement of a professional responsibility clause that permits nurses to challenge work assignments which are felt to detract from the professional and ethical obligation of the nurse to the patient. The position of ONA in my inquiry, then, is that if the government were to grant separate bargaining rights to the (largely male) doctors (or lawyers, et al), it must also do the same thing for its (almost entirely female) nurses.

Though ONA, naturally enough, believes that nurses ultimately do belong in a professional organization of their own (i.e., ONA), it did not suggest that there was now any substantial dissatisfaction with OPSEU among government nurses. What ONA does insist on, though, is that the nurses who work in the provincial government's own psychiatric

hospitals and other facilities should have the same freedom of choice on that score as is now enjoyed by nurses in the acute care hospitals which are financially supported by the government, though covered by the Labor Relations Act.

(f). OPSEU

Unsurprisingly, ONA's suggestions did not find favor with OPSEU. The latter organization is the successor to the old Civil Service Association of Ontario (CSAO) which predated the enactment of CECBA in the early 70's, helped to establish the principle that provincial government workers should have collective bargaining, and is the designated representative of all 65,000 Ontario public servants covered by that Act. OPSEU has prepared a major brief to the Ministry of Labor proposing changes in a variety of CECBA's provisions. The union also took an active interest in my inquiry, and made extensive written and oral representations to me about what it considered the appropriate principles for bargaining by prototype professionals.

(i). The present exclusion of certain professional groups from CECBA should be repealed. Instead, the law should recognize that professional employees are equally entitled to union representation and collective bargaining.

(ii). Such a grant of bargaining rights to professionals should be done in tandem with a similar extension of such rights to many of the supervisors and lower echelon managers now excluded by what OPSEU (like the Hydro Society) believes to be far too broad a managerial exclusion from Ontario labor laws.

(iii). Acknowledging the historic absence of prototype professionals from membership in and representation by OPSEU, the latter does not believe that these people should automatically be swept into its single, all-employee unit through simple repeal of the professional exclusion. Rather, the doctors, lawyers, et al should be given the opportunity to choose whether to opt in or opt out of the OPSEU unit.

(iv). However, OPSEU does insist that the key CECBA policy of avoiding employee fragmentation and uncoordinated bargaining must still be respected here. That means that if the prototype professionals did decide that they wanted collective bargaining to advance their employment interests, they must do so through OPSEU, not through a variety of separate and unrelated associations.

OPSEU emphatically rejected any suggestions that it was incapable of representing the interests of professionals, whether nurses or others. There is now a 4,300-member Scientific and Professional category within OPSEU, which bargains separately about the salaries of this higher-paid

component, with recourse to binding arbitration if necessary. Nurses make up over 1,900 of the members of this category, they have three of seven members on the negotiating committee, and OPSEU's first vice-president is a registered nurse. Thus OPSEU would vigorously resist any effort to dismantle any portion of this existing bargaining structure, whether for nurses, or for accountants, economists and other such professional groups. And the union believed that if doctors and lawyers now want the advantage of collective organization and negotiation with their government employer, they also must work within this same process which has successfully advanced and accommodated the concerns of this variety of newer professional occupations.

IV. THE GOVERNMENT AND ITS PROFESSIONAL EMPLOYEES

(a) Alternative Models for Employee Voice

The foregoing review of the parties' positions indicates how complicated a set of problems is actually raised by the apparent simple request by provincial government doctors and lawyers for binding arbitration of their salaries. Even within the several groups of prototype professionals there are some significant differences of view about the appropriate shape and scope of any negotiating relationship with the government. As well, the prospect that the government might grant such a request has evoked responses from such interested observers as OPSEU and ONA, and at the crucial point those two organizations are diametrically opposed in their positions.

And of course, one cannot ignore the fact that the provincial government also has a major interest in this matter; and the interests of the government (as an employer if not as a policy-maker) could well diverge from any and all of the above. The Ontario government did not state to me an explicit position on these issues--it is awaiting my report and recommendations about what the appropriate position should be. However, I did hear a variety of views and concerns about the range of possible options from the Ministers and senior officials who are particularly involved on the government-employer side of this relationship.

A host of technical issues were raised in the written briefs and oral presentations: e.g., about the contemporary

validity of the statutory exclusion, or the breadth of the appropriate unit, or the scope of negotiations, or the availability of binding arbitration. It is important, however, to place these matters in a broader setting, through which one can understand the ways in which alternative models of professional employee voice may serve the values that the community believes to be important here.

As we observed in the previous section of the Report, even the model of collective bargaining can take quite different forms. A group of professionals might be represented by a large independent union or by its own home-grown association; these employees might be included in a broad multi-occupational unit or each professional group permitted to have a separate relationship; dealings with the government could focus just on salaries or on the broad range of employment and professional concerns; deadlocks in negotiations could be resolved through strike action or through third party intervention, which itself could be recommendatory or binding. Each and all the alternative positions are exhibited in either the current situation or the proposals of professional employees in Ontario, some inside and some outside the direct focus of this inquiry.

But whatever the specific guise that it takes, collective bargaining is just an instrument designed to serve further social values. Among the important objectives are the improvement of the relative economic position of workers, or guarantees of fair treatment and protection for

individual employees, or providing the work force with some influence over what happens to them in a working environment where they are destined to spend much of their adult lives. In each of these endeavors Canadian workers have enjoyed considerable success through collective bargaining in its more traditional sense--involving representation of employees by an independent organization which periodically negotiates a collective agreement with a management team representing the employer. In the 80's, many union and non-union firms have been experimenting with a variety of mechanisms through which to offer the work force direct involvement in, and some sense of contribution to, the affairs of the enterprise. Thus, while I must initially consider whether these prototype professionals should finally be granted the same right to collective bargaining which was won decades ago by their fellow workers in the province, one must not lose sight of these additional mechanisms of worker voice, some of which might seem particularly well-suited to the talents and interests of the professional.

With that preface I shall now take up these two distinct but related questions. First, as a matter of principle should professional employees have the right to organize themselves for purposes of some form of group dealing with their (provincial government) employer? If the answer is in the affirmative, what concrete shape(s) should such a collective relationship take? Both of these

questions have been addressed in detail in the writings of a number of distinguished Canadian scholars in labor law and industrial relations--e.g., by Adams, Beatty, Goldenberg, Gunderson, Swinton and Thompson. I have read this literature with care and found it very helpful in my own thinking. However I shall not burden this Report with a lengthy rehearsal of this extensive debate about professional bargaining. What I shall do is sketch the essentials of the problem, and then state my own views and the reasons for them.

(b) The Role of Professional Employee Representation

Early in the post-war life of Ontario (and most Canadian) labor legislation, these prototype professionals were excluded from the statutory right to collective bargaining, which then was and still is the dominant mode of worker influence over their terms and conditions of employment. That legal exclusion rested on the simple fact that the employee in question was practicing one of the designated professions. No further consideration was given to the particular sensitivity of the job being performed or the nature and needs of the employer involved. The feeling at the time was that it was unnecessary and inappropriate for professionals as such to join a union and to engage in the typical activities of such an organization.

To some extent these feelings rested on our understanding of what it meant to be a professional, at least in the stronger sense of that term.

(i). If one takes the doctor as illustrative of the prototype, the practice of medicine required long years of education and training in order to develop highly specialized knowledge and skills.

(ii). The expertise involved in medical care left the patient in no condition to judge and appraise the quality of the medical services which they were offered.

(iii). However, both the necessity of and the risks from medical treatment made it vital to have high standards for entry into this profession and to regulate the character and the quality of the medical services being performed.

(iv). The statutory responsibility for the development and enforcement of such standards had to be delegated by the community to the governing bodies of the profession, which alone had the capacity to perform that role (for reasons (i) and (ii) above).

(v). Within the framework of professional self-government, the individual doctor was viewed as independent and autonomous, ethically committed to treatment decisions made solely in the interest of the patients who were entirely dependent on their doctor's judgment and concern. In turn, the doctor would be paid by the patient in accordance with the value and quality of the services provided.

Given that conception of the profession of medicine and the responsibilities entrusted to its members, most people (both inside and outside the profession) felt that there was something unseemly about doctors organizing themselves into a union, trying to negotiate a collective contract which would specify what they would be paid, and perhaps even taking strike action in pursuit of economic gain.

Serendipitously, it turned out that these professional values of autonomy, ethical service and individual merit were not actually incompatible with the economic well-being of doctors, at least at the time that post-war labor policy was being developed. The structure of medical practice had long rested on the self-employed practitioner or partnership, under which doctors entered into contractual relationships with their patients. The value and the scarcity of medical services allowed doctors to earn comparatively lucrative incomes. For decades, doctors have consistently ranked right at the top of the scale of occupational earnings, with the lawyers and other prototype professionals close behind. That meant that the organization of doctors into unions for purposes of collective bargaining could readily be viewed as just as unnecessary as it was inappropriate.

Even forty years ago there was a good deal of stereotype in that image of the professional. However, in recent years the gap between the image and much of the reality has become even more pronounced. Indeed, even the supposedly independent, self-employed medical practitioner now finds himself relying on a single government health insurance plan for almost all his professional revenues. Thus Ontario doctors have had to adopt much of the paraphernalia of collective bargaining to exert some measure of influence upon increases in the government fee schedule (and the lawyers who rely on Legal Aid have now started down that same path). But even more pressing problems are experienced by the employed professional, and it is within this last category that we find the most urgent pressures for group action.

In actual fact most of our prototype professionals are employed by someone else, rather than work alone or in partnership with colleagues. Employment is the occupational situation of almost all Canadian engineers, of a large majority of its architects, a bare majority of the lawyers, and a significant minority of doctors and dentists. True, many of these people actually work for a professional firm, and thus do not experience anywhere near the same conflict between employment and professional status. They see themselves as associates in their firms for a relatively short period of time, while they are obtaining the training and experience they will need before they are admitted to

the ranks of self-employment and/or partnership: and in the meantime their employment rewards and regime are established by their senior colleagues in the same professional calling. However, in recent years more and more lawyers, doctors et al find themselves working in large, bureaucratic organizations whose mission and authority is not specifically professional. Epitomizing that kind of employer is the government--whether federal, provincial or municipal--and such crown corporations as the Ontario Hydro. It is in that latter setting that the initial professional distaste for collective organization has now largely disappeared.

As was evident in the previous section, the immediate reason why Ontario government doctors and lawyers want to organize is essentially the same as motivated non-professional employees, public or private. They believe that their salaries are too low, that their relative position is worsening rather than improving, and they want to take steps to alter that situation.

True, if one were to compare the salaries of government lawyers and doctors to those paid the average industrial or office worker, the former might seem to be quite well-paid. But that simply is not the reference point adopted for salary comparisons. The psychiatrist and the crown attorney can reasonably say that they have invested long years in education and training with little or no income during much of that period, in order to earn their way into their

respective professions. Now that they have this status, these professionals face major responsibilities and strain in the work which they perform. The relevant comparison, then, is with the earnings of people who have essentially the same training and responsibilities, but who happen to work in other settings. In that respect, in terms of both the process and the result the professionals employed by government tend to feel that they are faring quite poorly in comparison with their counterparts in private practice.

Unlike the defense attorney, for example, who sells his services to a variety of individual clients at a rate which is mutually agreeable to the two sides, the crown attorney who represents the prosecution in court must accept a pay scale which is determined by the Civil Service Commission and the Management Board. The individual crown has essentially no leverage with which to alter the scales established by a human resource branch which is responsible for the salary policy of a government enterprise employing over 75,000 people. This crown attorney basically has the choice of just taking the job with the salary and benefits offered, or leaving for a job somewhere else. But that market-exit option can be quite unattractive for the people who may like the kind of work that is possible only in government service (e.g., those who would rather prosecute than defend criminals), or those who have invested a substantial part of their working lives in a government

career and would find it personally difficult and disruptive to leave.

There are two reasons why that lack of individual influence of the typical career employee exerts a particularly depressing effect on the earnings of professionals in government. It is a well-documented fact that governments tend to pay their higher-level professional and managerial employees less than the "market rate" observed in the outside private sector, while the same government may pay its lower-level, less skilled employees close to or even more than the private sector average. Such compression of government salaries at the top stems initially from the political need to keep the salaries of the elected cabinet ministers within bounds that are tolerable to the ordinary voters; then the reluctance to pay Deputy Ministers appreciably more than the elected cabinet officers to whom they report; and finally a strong managerial disinclination to pay a staff psychiatrist or crown attorney as much as the deputies and directors who are the departmental superiors of these front-line professionals (and who often are promoted out of the latter ranks). But the consequence of all this is that the crown attorney and the psychiatrist see themselves falling farther and farther behind people who were classmates in law or medical school, and with whom they may be practicing regularly in the same court room or hospital.

At the same time as unorganized professionals see their salaries constrained by this political/administrative ceiling, they also observe that everyone else in these courtrooms or hospitals has been allowed to organize, to have skilled bargaining representation, to have recourse to binding arbitration (or, in some jurisdictions, to strike action) in order to extract a better deal than the government's human resource managers were initially inclined to offer. Over an extended period of time, such collective action has materially improved the relative earnings of nurses and other hospital workers, or police and court staff. The consequence is that the prototype professional in these facilities can see a gradual but persistent rise in the government salary floor, and thus a considerable narrowing of the earnings gap as between people who have far fewer years of training and significantly less responsibility.

I do not mean to endorse in this Report the specifics of the salary complaints of either the doctors or the lawyers working for the Ontario government. The doctors' case is now in front of the Burkett Board for review, and a decision is expected fairly soon. While the Attorney-General and his officials have not challenged the conclusion of the management consultants that there is some problem with current crown salary levels, I have not attempted to analyze the nature and the dimensions of this problem. My assignment was not to make actual recommendations about

salary increases or new terms and conditions of employment. Rather it was to consider the appropriate mechanism through which such substantive decisions should be made about professional salaries, benefits and working conditions. The point of the foregoing paragraphs has been to explain why there is an inherent problem with the current arrangements, a structural flaw which would remain even if the government were to provide an immediate infusion of funds to try to allay the current sense of grievance.

What is needed is some mechanism which would right the imbalance in the current situation under which these professionals feel themselves squeezed between the political pressures stemming from above and the bargaining pressures exerted from below their ranks. Such a mechanism might or might not result in substantial improvements in the salaries paid to all these currently excluded professionals. My impression is that somewhat different pay adjustments would likely be justified for the several professional groups with their varied experience under the current situation. But whatever the immediate substantive effects, the point of the process would be to give this comparatively small number of employees working for this large government organization much more confidence that their particular needs and concerns were being given a fair hearing and taken seriously.

The greater degree of satisfaction with the results of such a mechanism are important not simply to the

professional employees themselves, but also to their government employer and the general public which it serves. That point is worth some emphasis. Indispensable for the effective operation of our criminal justice system or our mental institutions, for example, are crown attorneys or psychiatrists who aspire to such a career with the government and who perform at a high level of morale and productivity. The senior officials in the Ministries charged with the operation of these institutions were quite candid about how the current discontents were hampering their ability to retain their best people and to elicit the fullest commitment from those who do stay. The province of Ontario spends a lot of money in these and other parts of its government operations where professional employees play a vital role. (My back-of-the-envelope calculations are that provincial expenditures on compensation alone for those 2,000 or so excluded prototype professionals is now approaching $150 million a year.) Thus the province needs to have the kind of employment arrangements under which it can obtain the quality of services that it is paying for.

The foregoing is the basic argument in favor of giving these government employees some kind of meaningful group voice in the determination of their salaries and employment conditions. In the next section I will tackle a variety of ticklish issues which must be faced in designing the precise format through which such a professional voice should be expressed and heard. Here, though, I must still address

some legitimate reservations which many might feel about such a step.

(c) Concerns About Collective Professional Action

Two concerns are typically expressed. One is that if salary determination is made on a purely collective basis, we will lose the opportunity to reward individual merit--something which is quite important for a highly-skilled and highly-paid group of professionals. Additionally, if professionals are allowed to organize collectively for purposes of salary and other economic gains, this could create some risk to their professional calling and to the welfare of the people whom they are obligated to serve.

My own judgment about each of these expressed reservations is that while the principles of individual merit and ethical service are unquestionably important, there is no inherent conflict between these values and a mechanism which offers professional employees a meaningful voice in their terms of employment.

With respect to salary, for example, the government of Ontario has recently adopted a Pay For Performance program for its senior executive employees. This program significantly increases the salary ranges for deputy ministers and the like--to a point more commensurate with the talents and responsibilities involved in running a large complex ministry--while insisting that actual pay increases for individual officials will depend much more on their own quality of performance. It is hoped that on the basis of

this initial experience, a similar program will then be developed for middle managers and professionals. Indeed, a happy byproduct of this current program is that it substantially elevates the deputy minister salary ceiling which now constrains the pay of our prototype professionals. If the government does follow through with comparable improvements in the professional salary scale, I quite understand why it would want to retain considerable leeway in using such a higher levels of pay to reward higher-quality individual performance, rather than be locked into rigid salary progression for the entire category.

However, there is absolutely no reason why that kind of "pay for performance" system could not be developed in a salary program negotiated with the professional employees, rather than only in a program unilaterally adopted by human resources management. Not only is such flexibility quite common within collectively-bargained pay schedules in some private sector industries such as the media or entertainment, but it is also to be found in the salary system that was jointly evolved by the Ontario Hydro and its Society of professionals and managers. True, such a negotiated system will likely contain some explicit formulation of the source, criteria and timing of such performance evaluations and merit pay increases. But that would be a positive advantage over the current regime which, in the eyes of the professional employees at least, seems mysterious, unpredictable and thence somewhat suspect.

Turning now to the issue of professional ethics, there is a popular impression that these values are somehow incompatible with any mechanism which smacks of unionism. To my mind, though, the problem, where it does exist stems as much from the bureaucratic employer organization as it does from collective employee action, and must be addressed accordingly.

Take the analogous case of the registered professional nurse. I am sure that those nurses who have occasionally been moved to strike action have felt serious qualms about the conflict this creates with their professional obligation to the patients in their care. If we prefer not to remove that conflict by eliminating all collective bargaining for nurses, one can avoid much of the dilemma through binding arbitration of bargaining deadlocks (though this option has some problems of its own, to which I will refer in the next section of this Report). But the nurse might also experience a comparable professional conflict when faced with a situation where hospital administrators--perhaps under severe financial constraints--have established work schedules and case loads which are not compatible with adequate levels of care for sick patients. In that situation the individual nurse acting alone and without protection has almost no leverage with which to reverse such administrative directives that might seem entirely inappropriate to professional colleagues. But when the nurses act as a professional group with effective

representation and meaningful negotiation, they can and have produced contract provisions which preserve rather than undermine the standards of their professional body. One can find similar examples of such positive support for professionalism in collective action taken by associations of university faculty, professional engineers, and the like.

I do not mean to suggest that the conflict between professionalism and bureaucracy is widespread--in particular, inside the provincial government--nor that employee organization is always the source of the solution rather than of the problem. Judgments about and responses to this tension must always be made in the light of concrete cases. But my general analysis of the problem and my reading of the historical experience leaves me confident that there is no inevitable conflict between the ideals of individual merit and professional autonomy and a mechanism which allows the group of professional employees to exert some meaningful influence upon the salary and personnel policies of their government employer. As we saw in Section II above, most public employers in Ontario and in the rest of Canada have now accepted that principle with respect to most of their professional employees--including some who work in the province's psychiatric hospitals and criminal courts. It is now time for the Government of Ontario to extend that same right to these prototype employees.

V. MECHANISMS FOR PROFESSIONAL EMPLOYEE VOICE

(a) The Design Dilemma

My analysis in the preceding section of the appropriateness of collective action by government-employed professionals was pitched at a sufficient level of abstraction that the conclusion followed relatively easily. The basic ingredients of my argument were as follows. Like other employees, professionals have important needs as workers which must be satisfied in their employment arrangements; when working for a large employer organization (like a government), the individual professional has little ability to directly influence the terms of employment that will be made available; thus professional employees should be given the same right as other employees to organize into a cohesive group which can deal more effectively with their employer; any possible conflicts between such group action and the values of individual professional quality and ethics can and should be addressed and resolved through such collective negotiations, rather than these potential problems being used as the reason to avoid such negotiations altogether. The conclusion, then, is that we should remove the legal barriers which now exist to such group action by prototype professionals--in particular, their exclusion from CECBA which governs the relationship of the provincial government to its employees.

That conclusion is now broadly accepted by both the scholars and the policy-makers within Canadian labor

relations (and indeed has already been recommended in the 1980 Report of the Ontario Professional Organizations Committee). However, that proposition is stated at far too abstract a level to be operational. When one begins to flesh out the nature and shape of a mechanism through which these government professionals might exercise some collective voice and influence upon the Ontario government, one immediately faces a whole series of difficult choices--e.g., regarding the scope of the employee group, the range of issues to be dealt with and the ultimate method for resolving negotiating deadlocks.

The significance of these problems can be appreciated as soon as one spells out the diversity of possible choices.

(i). Should one confine the definition of the appropriate employee unit to just a specific segment of one professional category (e.g., the crown attorneys), or should one include all the members of each single licensed profession (i.e., all doctors or all lawyers), or all the members of the five prototype professions (doctors, lawyers, engineers, et al bargaining together), or include all the members of all the professions (i.e., including the nurses, the accountants, et al), or all the employees of the Ontario government taken as a whole?

(ii). Another way of putting the same problem is to ask whether representation of these professional employees should be by such existing bodies as the

Crown Attorney Association, the Medical Staff Association and the Civil Lawyers Association (and probably sometime later the Professional Engineers Association and/or the Architects Association), or by some newly-fashioned Ontario Government Professional Employee Association, or should representation actually be provided by OPSEU, the current bargaining agent for all the government employees covered by CECBA, whether professional or non-professional?

(iii). Associated with this question is whether all professional employees should be entitled to engage in such collective action, or whether excluded from that activity should be any professionals who are employed in a managerial or confidential capacity. If there is to be that latter exclusion, does "management" require that the person actually make the relevant decisions on behalf of government or is it sufficient just to make effective recommendations about them? Does managerial authority have to be exercised over other professionals, or just over the support staff (e.g., in the hospital or the crown offices)? Upon judgments such as these will turn the issue of whether, e.g., the Directors in the A.G.'s Criminal Division, or the Regional Crown Attorneys, or even the local County and District crowns should be members of the Association, as also the Chief Psychiatrists, or the Program

Directors, or the Chiefs of Service in the province's mental hospitals.

(iv). With respect to the range of issues to be discussed, should one include everything that the professionals are interested in and about which they feel they can make a contribution (including government policy regarding mental patient care or criminal prosecutions); or just matters relating to professional terms of employment and working conditions (which likely would overlap considerably with the above); or all terms of employment except those specifically excluded by S.18 of CECBA (e.g., government operations, superannuation and the merit system); or should it also exclude a variety of terms and benefits that are now bargainable under S.7 of CECBA, but which might be difficult to deal with in numerous small and fragmented units (e.g., hours of work, holidays, vacations, and disability and life insurance); or should professional negotiations be confined just to salaries and salary-related items?

(v). Should the manner of resolving these issues be pure negotiations between the government and the representatives of the professionals (in which case the government would retain the ultimate authority to decide these issues in the absence of voluntary agreement); or third party fact-finding with recommendations (in which case the government employer

can still reject the latter); or final and binding arbitration or strike action (either of which does put the employees on a somewhat more equal plane with their employer, but presents some significant problems of their own)?

This synopsis of the variety of issues and options graphically displays the numerous difficult choices that must yet be made. There is a natural inclination to treat this problem as if it were, in effect, an industrial relations smorgasboard--in which each party was free to choose whichever item it wanted from these several categories in order to put together the most appetizing combination. If presented with that opportunity, I am sure this is what the professional groups would find most appealing: a very narrow professional grouping, one which is represented by its own home-grown association, which included within its membership all the professionals up to and even including the Director level, which would be empowered to discuss with government a broad range of both employment and professional concerns, with that process culminating in final and binding arbitration about any matter in dispute. However, my own experience in labor relations and its legal policy framework is that the problem is much more difficult than that. There is an affinity between these different components of a labor relations system, such that the choices that one makes at one point limit and shape the options available at other points. The

nature of these constraints becomes visible when one seeks to accomodate in the design of this employee voice model the interests of other parties who are also affected by that process.

(d) The Burkett Award

What I mean by that comment becomes clearer as one considers the specific proposal made by the medical staff within the government's psychiatric facilities. This is the professional group which is now farthest along the path towards collective bargaining and was most emphatic in its proposals--among other reasons because these have been largely endorsed by the Burkett award (which is reproduced as Appendix B to this Report).

The original position of the medical staff was that their own association should negotiate on behalf of all its members in these hospitals--psychiatrists, other doctors and dentists, with no explicit managerial exclusion. Negotiations should be about "all terms and conditions of employment...and all rights, privileges or duties of the employer, the Association and the medical staff", with the process ending in binding tripartite arbitration about "all matters in dispute". The Burkett Board essentially adopted this position with two significant modifications: the scope of the unit should not necessarily exclude the relatively small number of other government-employed physicians, while the scope of negotiations should exclude the range of issues specified in S.18 of CECBA and be confined to those matters

enumerated in S.7 of that Act. However, as regards the two most crucial points at issue, binding arbitration for a unit confined to medical staff, Burkett sided with the doctors who insisted that this also be the recommendation that I must make.

That conclusion is itself illustrative of the "pick and choose" approach which I referred to above. Binding arbitration is proposed because that is the policy already available under CECBA for the other provincial government employees working in the mental institutions (and elsewhere throughout the government's operations). On the other hand, a small professional unit confined to "medical staff" was recommended in the face of CECBA's contrary policy of a single, all-employee unit--because of the distinct community of interests supposedly created by the separate licensing and regulatory programs existing for each profession.

As I will now try to show, I find considerable difficulties in these Burkett recommendations. But I also understand how they would seem quite plausible if one viewed the problem, as Burkett necessarily did, from the point of view of the special history and current position of the medical staff alone. In my inquiry I have had to situate the medical staff within the broader context of all the governments excluded professionals, and also of organizations such as OPSEU and ONA which now represent (or, in the case of ONA would like to represent) some or all of the government employees now organized under CECBA. From

that perspective, the bargaining unit issue appears much different and more difficult.

In the first place, the unit sought by the Medical Staff Association does not precisely square with the provincial licensing schemes relied upon by Burkett. While the bulk of the Association members are psychiatrists or other doctors, some members are dentists working in the psychiatric facilities, and dentistry is a separate and distinct profession with its own statute and governing body. On the other side, the Association has only represented the doctors who work in the mental hospitals, and never evinced any particular interest in the handful of doctors working in largely non-clinical roles within the government. True, Burkett did suggest that these latter doctors need not be excluded from the Association's unit; and given the fact that these would be only a small fraction of its members (about 30 out of 300), the Association is prepared to take them in as the price for securing a separate "medical staff" unit. But this is a pressing problem among the lawyers where there is a long-established Crown Attorney Association representing the 330 lawyers in the Attorney General's criminal division, and another newly-created Civil Lawyers Association representing the 310 lawyers in the various other aspects of government legal work. The crown attorneys, in particular, have no interest at all in becoming part of a broader unit which would also incorporate this heterogeneous group of civil lawyers with whom they

have never had any connection and with whom they feel little or no identity--irrespective of the fact that both criminal and civil lawyers do happen to belong to the same Law Society of Upper Canada.

The lesson from these cases is that the external professional affiliation of these employees bears only an accidental relationship to their actual community of interests in dealing collectively with their government employer. Undeniably, the fact of being a professional is very significant. The lengthy period of education and training, the greater responsibilities and status, the higher salaries and benefits, the history of exclusion from CECBA and OPSEU--all these are reasons why none of these prototype professionals have any current interest in being grouped with the other government employees now represented by OPSEU. But the positive group identification of these professionals is much more closely connected to the settings within which they work--i.e., the crown attorney in the criminal courts or the medical staff in the psychiatric facilities--than to the professional organizations to which they happen to belong. And there is nothing surprising in that fact. Recall that the earlier argument for collective representation was that these people had distinctive interests as employees which required some such group action irrespective of their professional allegiance and obligations. That is why the common experience of where they work and what kinds of work they do has produced rather

different organization of these prototype professionals as employees than the statutory licensing boundaries relied upon by Burkett to justify separate bargaining units for them.

The response which is made to that argument is that whatever its precise source, the fact is that there are these different histories and current identities of the various professional groups, and these differences can and should be acknowledged and accommodated in whatever framework is devised for professional employee negotiations. If that framework happens to produce a single medical staff unit for doctors and dentists, and separate units for crown attorneys and the civil lawyers, and perhaps another unit or two for engineers and architects, then so be it! Such a measure of self-determination for these prototype professionals is said to be a good thing for the employees and not a serious problem for the government employer--as is evidenced by the fact that some other Canadian jurisdictions (most notably the federal government) now do provide their professional employees with essentially that kind of bargaining automony.

Addressing first the point about the situation in other jurisdictions, the federal experience does show that a multiplicity of professional bargaining units is a viable, if not necessarily an ideal negotiating format: though the federal government situation is ameliorated somewhat by the fact that a single professional employees organization is

the designated representative of most of these units. It is also true, though, that most other Canadian jurisdictions do place restrictions of varying degrees upon the availability of separate bargaining for most if not all of these prototype professionals. And of course the most immediate precedent for our purpose is Ontario's own CECBA which exhibits a strong policy distaste for fragmentation of the provincial government work force, and attempts to supply the necessary degree of pluralism and flexibility through separate salary bargaining for nine different employee categories (across the roughly 65,000 employees represented by OPSEU).

A particular reason why CECBA's policy is so pertinent to this inquiry is that if I were to recommend that the government adopt separate bargaining representation for the doctors and for the lawyers, the question would immediately be raised how one could fairly deny that same self-determination to other government professionals. The ONA intervention in my proceedings brought that issue home vividly to me. As ONA put it, if the (still largely male) medical staff were given full-fledged bargaining rights within a unit of their own choosing, but the (almost entirely female) nurses continue to be submerged in the one big all-employee unit, that hardly appears conducive to the Ontario government's newly-proclaimed policy of pay equity for working women. But if the government (over the vehement objections of OPSEU) were to respond to that concern by

giving its 2,000 nurses the same freedom of choice which the 300 doctors are now seeking, one could hardly deny that same option to the variety of other employee groups within the scientific and professional category (an option they now enjoy under the federal law). Of course even if all these groups were given the legal right to separate representation, many would likely opt to stay with OPSEU because they were quite satisfied with its performance. But the likely consequence of such a policy would be to establish at least four, and perhaps as many as a dozen, professional bargaining units among the provincial government's 5,000 or so professional employees--side by side with a single unit for more than 60,000 non-professional employees (and that in turn would raise the question of how one could fairly limit such freedom of choice to those government employees fortunate enough to enjoy professional status on the job).

That leaves unanswered the question that is implicit in the foregoing analysis. What precisely is wrong with the proliferation of bargaining units freely chosen by a number of employee groups, professional or otherwise? The most pressing objection to such fragmentation would be the increased risk of strike action. Each unit carries on its own negotiations, any one of these negotiations can lead to an impasse and thence to a work stoppage, and this in turn will cause disruption to the employer, to other employees (in different units who might have settled their contracts),

and to the general public which is dependent upon these public services. However, that objection is not immediately applicable here, because the policy of CECBA is to require arbitration rather than strikes for resolving bargaining deadlocks, and each of the professional groups seeks that same termination point for its own negotiation procedures.

Even with arbitration, though, there are substantial difficulties with a multiplicity of negotiations. Simply having to go through numerous arbitration proceedings in each bargaining round can cause considerable drain upon the management time, if not the financial resources, of the government. More important, a variety of arbitration proceedings is likely to produce a variety of decisions about employment terms and working conditions--about hours of work, overtime, holidays, vacations, leaves of absence for different reasons, insurance benefits and so on. After all, if the law has provided for separate employee representation and arbitration, that implies an endorsement of the value of employment terms that are specially tailored to the needs and priorities of each employee group. But if all these employees are actually working in the same mental hospitals, or criminal courts, or other government departments or facilities, such disparities in employment conditions can make the management of such integrated operations a very difficult task.

Again, there is a possible solution to that problem. Suppose we were to reduce the scope of the bargaining agenda

to a narrow set of salary-related items: we would thereby avoid the disparity in working conditions and the effect that this has on government operations, while preserving the flexibility and diversity needed to establish a range of salaries for occupational groups (which must of necessity be nearly as diverse inside government as they are in the outside labor market). And indeed that is the policy of CECBA itself, which requires common bargaining about the general run of employment conditions but adopts categorical bargaining about salaries.

Even with respect to the salary issue, though, there is a particular problem with a multiplicity of negotiations in arbitration proceedings. While it is true that government doctors are going to be paid more than engineers, just as they are paid more than nurses, it is not so clear that the criteria for determining these salaries should differ. I was struck during the course of my inquiry by the fact that the salary grievance of the medical staff stemmed from their perception that they had fallen behind doctors in private practice, while in the case of the crown attorneys, much of their discontent stemmed from the erosion of their salary position vis-a-vis other people working within the public criminal justice system (i.e., the judges, police, et al). In fact, the government's salary brief to the Burkett Conciliation Board actually drew upon the Sibson Report which showed how salary increases for the government's medical staff had surged ahead of the crown attorneys during

the 80's. The point of that example is that a government employer would encounter a rather difficult problem if two separate arbitration boards were to make binding awards--one for the doctors and one for the lawyers--which rested on entirely different views about the appropriate reference point for government professional salaries.

I would emphasize the fact that it is arbitration which is a major source of this particular difficulty. If the government's work force were divided up into a number of separate bargaining units, each entitled to its own ad hoc arbitration panel, it would only be by accident that such an uncoordinated process would produce a coherent approach to the salary problem. By contrast, if bargaining deadlocks had to be resolved through strike action, then the Management Board could try to sustain a single government position about the criteria for professional salaries for the several bargaining units with which it was dealing. But that stance is no longer possible once the government has conceded to an outside third party the authority to make the final and binding decision on this issue--with the results dependent upon the nature of the arguments made in each proceeding and the views and reactions of particular arbitrators who happen to be selected.

I am not suggesting that the solution to this dilemma is to be found in adoption of the strike as the method of resolving negotiating disputes between the government and its professionals. These professional groups did not want

to have the strike weapon, and arbitration is the current legal policy under CECBA for all other provincial government employees, many working side by side with these same professionals. What I do insist upon, though, is that if one takes arbitration as a given in current provincial government bargaining, the prospect of that technique as the end point of the bargaining process produces a rather unhappy combination with another policy that favors a number of small bargaining units at the outset of the process. I feel quite strongly that such a framework would engender significant problems in negotiations about a broad range of working conditions, and I have real qualms even with respect to salaries.

VI. MY RECOMMENDED PROGRAM

My primary reason for having undertaken that rather extended analysis of the Burkett recommendations was to show how complex a task it is to design an instrument for employee voice and influence. The choices one makes in favor of one component are connected with and limit the options available at the next stage. In particular, if we respond to one priority of these prototype professionals--e.g., their desire for a final and binding procedure to resolve negotiating deadlocks--we thereby limit our choices about the scope of the unit, the range of issues to be discussed and so on. Contrariwise, if we want to encourage the emergence of small groups of professionals with close communities of interest who would regularly canvass with their employer a broad agenda of mutual concerns, it is considerably harder to justify arbitration as the end-point of that process.

Having taken this length of time to expound on the difficulties of the problem, I must now offer my own recommended solution. My proposal consists of quite a number of ingredients which are tied together in a manner which I shall explain. I express these recommendations as a set of fairly broad principles rather than as a detailed legal blueprint, and at certain points I suggest some alternative options. Within the framework of the key principles, some degree of flexibility is needed in mapping out the course to be followed, and judgments about these

specific features should be based on consultation with the affected professional groups about the precise format with which they would feel most comfortable.

A. The starting point must be formal endorsement and commitment by the government to the principle that these prototype professionals are entitled to deal with their employer on a group basis--i.e., that these people also have this fundamental right of association now enjoyed by almost all other non-managerial provincial employees. What this principle implies is that these professional employees would be free to organize themselves into an association which could represent them in the determination of their conditions of employment: the government would then be required to recognize and deal with such a representative body within the framework I will elaborate shortly. As well, any professional employee who is a member, official or spokesperson for such an association would be guaranteed protection against any discrimination or reprisal by reason of having undertaken such group action, whether in the formation or the operation of the professional employee association.

B. An immediate step through which one could implement this right of association would be the repeal of the current S.1 (1)(f)(iv) of CECBA which excludes these named professional groups from the statutory definition of "employee". That legal action would bring these prototype professionals under the umbrella of S.29 of CECBA and its

guarantee of no employment reprisals against someone who has engaged in the legal activities of an employee organization.

However, simple repeal of the professional exclusion from CECBA coverage could automatically sweep all these prototype professionals into the broad, all-employee unit designated under this Act and represented by OPSEU. Neither these professional employees, nor the government, nor OPSEU believe that this would be an appropriate result. Having been statutorily excluded from this system of provincial government-union bargaining during the crucial formative years of its life, these professional employees deserve a choice about whether they do now want to cast their lot with the rest of the government employees.

Thus, CECBA and its Regulations should be amended to establish a framework under which one or more of these professional groups could by majority vote opt into the OPSEU unit and one of its existing or newly-created categories. And given the history and current sentiments of these hitherto excluded professionals, I would also recommend that they be given the right to opt back out of broad-based bargaining if they so choose. Otherwise, the fear of being locked forever into this format would likely be an insuperable obstacle to any of these people initially electing to join OPSEU to see whether that organization might actually be suitable to their needs as employee professionals.

C. One reason why I am so concerned about the viability of CECBA for this purpose is that I do not recommend the creation of a separate statutory program which would give these prototype professionals their own special program of full-blown collective bargaining--with a unit confined to their own professional constituency, which negotiates about the full range of employment terms and working conditions, culminating in final and binding arbitration.

I recognize that such a regime has been the long-standing objective of the Medical Staff Association before and after its essentials were endorsed by Burkett, and that same position is now echoed by the Crown Attorney Association. I am also aware that the appetites of these organizations has been whetted by the fact that such a separate program is now enjoyed by a few other employee groups with whom their professional-members regularly work--e.g., the interns and residents in the mental hospitals and the police in the courtrooms. However, those special purpose arrangements are basically, available only to employees who do not work directly for the provincial government (the one exception being the Ontario Provincial Police whose situation is governed by the Public Service Act). The labor relations policy for Crown employees is contained in CECBA, which does entitle these employees to full-fledged bargaining ending in binding arbitration--but only within the safeguard of a broad-based bargaining unit with one union representative. The fact of their

professional status should no longer disentitle the medical staff and the lawyers from the advantages of such a bargaining regime which now represents, e.g., the nurses in the hospitals or the provincial probation officers in the courtroom. But if these prototype professionals wish to have the benefits of such collective bargaining with the Ontario government, that same professional status should not shield them from the restraints which CECBA imposes on all their fellow employees.

D. If my recommendations were to end at this point, they might seem fair in the abstract--i.e., the prototype professionals would be treated exactly the same as all other government employees--but they would not be responsive to the real-life problems which precipitated this review. There is no immediate prospect on the horizon that any of these professionals would soon vote to join OPSEU and to engage in collective bargaining under the latter's mantle. The discontents which I expressed earlier would continue, probably worsened by reason of the disappointed expectations that had been raised by this inquiry. That would be to the detriment not just of these employees but also of their government employer and of the public whom they serve. What one needs is some alternative to full-blown CECBA-like bargaining which could ameliorate at least their major problems, without offending the principle of equal treatment as between doctors and nurses or lawyers and probation officers. In fact, experimentation with such an alternative

for these prototype groups might provide some useful experience for the remaining professional and non-professional employees who now participate in just the conventional bargaining system.

E. The first component of such an alternative model would be a commitment by the provincial government to establish an ongoing relationship between these professional associations and the ministries which are responsible for the facilities and operations within which their members work. Such a relationship should be embodied in bilateral committee structures whose members address the broad array of problems that arise in the day-to-day lives of these ministries and their professional employees. The agenda would consist not simply in such "employee" concerns as compensation and working conditions but also "professional" views of how the mission of the ministries might better be performed in the interests of the constituencies being served as well as the people who work in it. Within such a committee structure there would be no need to hew closely to the lines now drawn in CECBA about who should be excluded from participation in or representation by the professional association, or about what subjects are properly open for discussion. The assumption, instead, is that this would be a comparatively non-adversarial, collegial arrangement; within which the participants around the table regularly addressed problems as they arose, did the necessary research and analysis about possible solutions, and agreed to solutions which could

either be implemented immediately or recommended to the responsible Minister or the Cabinet as a whole.

As is now gradually being appreciated within the private sector, there are considerable mutual advantages to such a process for both the enterprise and its employees, and this format is especially well-suited for people with the background, position and interests of these professionals. However, two features are essential for the success of such an endeavor.

First, the program must rest on a foundation whereby one side (in particular, the government employer) cannot unilaterally repudiate the exercise, e.g., because of the unhappiness of a particular Minister about how the Committee has dealt with an immediate and sensitive problem. Second, the government must be committed not just to the abstract concept of professional involvement, but also to the results as they regularly flow out of the process. What that means is that if there is bilateral consensus between the senior ministry officials and association representatives on the committee, their agreement should normally be decisive--at least in the absence of real problems this might create for other areas or policies of the government which could not readily have been appreciated here.

If the provincial government is not prepared to accept and to stand by these latter conditions, I think it best not to try out such a "professional involvement program". Otherwise, having awakened the latent interests and

contributions of the professional employees, consistently to deny the latter the benefit of the process would likely aggravate rather than allay the current unrest.

F. Such a non-adversarial, non-contract oriented approach might well be considered a reasonable substitute for CECBA-style collective bargaining about the broad array of working conditions. However, I do not consider this to be a sufficient vehicle for handling the key issue of salaries. Here these professional employees need the additional leverage which comes from direct salary negotiations with the Management Board and an appropriate mechanism for resolving deadlocks that occur in these negotiations. Given my own personal philosophy of industrial relations, I am not a strong admirer of compulsory interest arbitration as the standard technique for resolving bargaining disputes for any and all public employees. However, a preference for arbitration instead of the strike is the prevailing legal policy for all Ontario government employees, and for many others who work in the province's health care and criminal justice systems. Until and unless that general policy were to be rethought and revised, it should be followed in the case of these prototype professionals. I recommend, then, that salary disputes between the Management Board and these professional associations be resolved through binding arbitration.

G. For reasons I developed in detail earlier in this Report, the nature and scope of such arbitration would have

to be restricted in a number of ways, if and to the extent these prototype professional chose to operate outside the framework of CECBA. One such limitation which I recommend is that arbitration for a purely professional unit be confined to salaries and perhaps also a few items that are purely financial and distinctively professional (e.g., government reimbursement of professional fees). The broad array of fringe benefits and working conditions could usefully be discussed within the committee structure proposed above, and hopefully many problems resolved there. However, I do not think that the provincial government should have to face the risk of a precedent-setting award about disability benefits, for example, issued by an arbitrator responding to a case made by just a tiny handful of the government's employees. And again, that restriction on the use of arbitration by these professionals would be in accord with a long-standing agreement between OPSEU and the provincial government which provides that "local" arbitration (e.g, for the nurses within the scientific and professional category) is limited to salaries, to the exclusion of other benefits and conditions.

H. Even with respect to salaries I am concerned about the problem of the fragmentation of bargaining and the disparities in arbitral rulings (and the one-way ratchet effect this eventually would have on the government pay structure). There are two possible ways in which that

problem can be addressed--one preferable in principle, but the other perhaps easier in practice.

I would permit only a single salary arbitration proceeding each year (or during each bargaining round) for any and all of these opted-out prototype professionals. Thus, if the Management Board were able to reach a voluntary settlement with the Crown Attorney Association, for example, these parties should be able to sign such an agreement separately. But if the medical staff and the civil lawyers were both at a deadlock and seeking binding arbitration, then such adjudication would be done by a single arbitration board selected for both sets of negotiations. That procedure would insure that a single panel listened to and evaluated the arguments made in both settings, and wrote a decision which embodied a common approach to the two salary disputes. Over a period of time, I suspect this would also require these professional associations to meet regularly and to develop some coordination in their approaches to the salary questions (both in the immediate arbitration and also in earlier negotiations). Such a gradual convergence in the views and attitudes of these now highly-divergent groups would be all to the good.

I. The above is my preferred recommendation about how to secure some coordination in salary arbitration. Some might object that this would pose difficulties in arbitral selection, timing, case presentation and so. I believe that these admitted complications are solvable. But if the

eventual judgment is that such multi-dispute arbitration is unworkable, I recommend a fall-back alternative drawn from the framework agreement between the University of Toronto and its Faculty Association and suggested to me by the Civil Lawyers Association.

Under that contract binding arbitration is the standard mechanism for settling negotiation disputes. However, each side is given a limited escape valve from the finality of the proceedings: a particular award may be rejected in one round (in which case the employer's last offer is implemented), but in the next round that party is fully bound by the process. The point of this system is to protect each side from what might be considered a misguided "maverick" award (one which this party feels would not be followed by another arbitrator taking a second look at the problem the next time). However, the other side is given the assurance that this procedure will eventually produce--if not this year, then next year--an authoritative resolution of whatever issues are dividing the two.

J. Implicit in my analysis to this point is that I am not persuaded by ONA's proposal that the registered nurses be given freedom to choose separate bargaining through a union of their own (such as ONA). I did find ONA's intervention valuable in sharpening my own sense of these issues, and as is apparent I took serious account of its argument in reaching my judgment that the doctors and lawyers should have only limited room for separate dealings with the

provincial government. But I am not prepared to recommend additional measures which might well begin the unraveling of the existing OPSEU unit when there is no tangible evidence of any dissatisfaction by the employees immediately affected. Sound advice in labor relations is "If it ain't broke, then don't fix it!"

K. Finally, I offer no verdict about the argument by both OPSEU and the Hydro Society that the present managerial exclusion in CECBA reaches too far down into the ranks of provincial government employees, and should be substantially raised. That argument raises important issues that range far beyond these prototype professionals, and indeed beyond CECBA and the Labor Relations Act which covers the rest of the provincial work force. Within the confines of this limited inquiry, I could not begin to explore the ramifications of this issue with anything near the care and thoroughness it requires. The Minister of Labor now has a review underway about a variety of concerns with both CECBA and the Labor Relations Act. In my view that is the proper forum within which to raise and to settle the appropriate scope of the managerial exclusion from collective bargaining.

VII. CONCLUSION

The numerous recommendations in the preceding section and my analysis throughout the entire Report can ultimately be distilled down into these six essential propositions.

1. These prototype professional employees do have significant concerns about their employment with the provincial government, which can only be effectively addressed through some kind of group organization and dealings with their government employer. The experience with professional representation of other kinds of employed professionals in Ontario, and of the same prototype professionals in other parts of Canada, demonstrates that there is no inherent incompatibility between such employee organization and their professional obligations. Thus, these people should be extended that same basic right as is now enjoyed by just about everyone else employed in this province and across the country.

2. This basic principle of professional employee representation to deal with the government can be realized in two different forms. One involves repealing the exclusion of these prototype professionals from coverage under CECBA. That step would bring these employees within the general guarantee against any reprisal for undertaking such collective action, and with suitable adjustments it would also permit one or more of these professional

groups to opt into the CECBA system of collective bargaining within the unit designated under that Act and represented by OPSEU. Doctors and lawyers should have the same right to participate in this system of full-blown collective bargaining about all their terms and conditions of employment as is now enjoyed by other government professionals and scientists such as, nurses and economists.

3. In view of the fact that doctors and lawyers have long been excluded from that CECBA regime during the formative years of its life, the prototype professionals should also be offered a second vehicle through which to voice their employment concerns and to influence the government to improve their conditions. However, this alternative process should not consist of that same CECBA-like system of full-blown negotiation and arbitration, modified only by granting the doctors, lawyers, et al the special privilege of their own separate associations and units.

4. The second model which I envisage would itself have two components. One would involve joint committee structures at the ministerial or even more localized levels (e.g., within the criminal justice system of the Attorney-General ministry). These bilateral committees, made up of senior officials from the ministry and representatives of the professional association would address the broad array of employment

and professional concerns within the relevant settings -- but not in a bargaining mode that culminates in either arbitration or strike action. However, this alternative process would itself have a second track, under which there would be direct negotiations with Management Board about the salaries of these professionals.

5. My hope and expectation is that in these direct negotiations the provincial government will now be in a much better position to address the current salary discontents of the employed professionals. The reason is that the lid imposed by the artificially low salary ranges for Deputy-Minister and other senior executives has been lifted by the government under its new Pay for Performance system. Indeed, there is no reason why a comparable program could not be fashioned for these professionals through direct negotiations with their representatives.

6. But if and when such negotiations prove unsuccessful in producing voluntary agreements about these salary issues, then I recommend binding arbitration as the procedure for resolving such deadlocks. However, while I do believe that within this second model, the professionals should be able to retain their own separate associations as representative, I do not believe they should also have a right to their own separate arbitration proceedings.

Rather, a single arbitration panel would be used to resolve any outstanding salary disputes within any or all of these prototype professional categories.

Some aspects of the foregoing program would require statutory amendments to CECBA. However, the second approach would not require a statute to be established, and indeed I would recommend against legislation at the outset at least. What is required, instead, is a formal statement and commitment by the provincial government to the process, and then a considerable amount of work by the parties affected in the design of the precise format(s) which would be most suitable for their varying needs and concerns. The ultimate point of this entire exercise is to foster regular involvement by these professionals in their workplace, both to give the professionals greater influence over their own terms of employment, and to elicit their positive contribution to the mission of their ministries. Ideally, that involvement and that contribution should be drawn upon right at the beginning of such a new venture.

AN OVERVIEW OF COLLECTIVE BARGAINING BY SCIENTIFIC AND PROFESSIONAL EMPLOYEES IN THE FEDERAL AND PROVINCIAL JURISDICTIONS

SUMMARY

1. Ontario is the only jurisdiction that specifically excludes all five professions under labour legislation applicable to the Crown. Alberta legislation specifies exclusion but provides for an opting-in to the bargaining unit.

2. Under legislation applicable to the private sector and other parts of the public sector excluding the Crown, Alberta, Nova Scotia, and Prince Edward Island are the only jurisdictions that prohibit members of all five professions from bargaining. Ontario prohibits members of the legal, medical, dental and architectural professions from bargaining but permits engineers to do so.

3. Quebec and Saskatchewan applies the same labour relations legislation to the private and public sectors, including the Crown. In Manitoba, professional employees come under the general labour relations statute for certification while the balance of the civil service are subject to the Civil Service Act.

4. In Saskatchewan, the exclusion of doctors, lawyers, dentists, and engineers is by agreement of the parties and not by statute.

5. All jurisdictions, except Manitoba, prohibit crown attorneys or prosecutors from bargaining. This prohibition may or may not include other lawyers. In some instances, while other lawyers have access to bargaining, they do not exercise it. Possible reasons are lack of interest, inability to organize, satisfaction with treatment provided by the employer.

6. In a number of jurisdictions crown attorneys/lawyers have staff associtations that enter into discussions with ministry management regarding salaries and other matters. Usually these associations are composed of persons from all levels in the organization.

7. The voluntary recognition of the association of crown attorneys and other lawyers in Manitoba allows a more broader membership base than would be possible if formal certification was followed.

8. Professional groups do not seem to want to pursue formal bargaining arrangements if it requires inclusion in a multi-occupation bargaining unit (e.g. Alberta).

9. Where arbitration is a dispute resolution mechanism by mutual agreement such as in New Brunswick, the profession's bargaining leverage is reduced. Most professionals prefer arbitration. Strike action is not a strong tool for many of the professions. (e.g. engineers). At the federal level, arbitration selection does not have to be by mutual agreement and as a result the professional group has the best of both worlds.

10. When the provincial medical association is the bargaining agent, such as in British Columbia and Manitoba, the association at-large has tended to remain at arms-length from the local bargaining between the provincial government doctors and the government.

MEMBERS OF THE ARCHITECTURAL, ENGINEERING, DENTAL, MEDICAL AND LEGAL PROFESSIONS

JURISDICTION	LEGISLATION	ARCH.	ENGR.	LEGAL		MEDICAL	DENTAL
				CROWN	OTHER		
ONTARIO	Crown Employees Collective Bargaining Act	Yes	Yes	Yes	Yes	Yes	Yes
	Labour Relations Act	Yes	No	n/a	Yes	Yes	Yes
FEDERAL	Public Service Staff Relations Act	No	No	n/a	No(1)	No	No
	Canada Labour Code	No	No	n/a	No	No	No
ALBERTA	Public Service Employee Relations Act	Yes(2)	Yes(2)	Yes(2)	Yes(2)	Yes(2)	Yes(2)
	Labour Relations Act	Yes	Yes	n/a	Yes	Yes	Yes
BRITISH COLUMBIA	Public Service Labour Relations Act	No	No	Yes	Yes	Yes(3)	No
	Essential Services Disputes Act	No	No	n/a	No	No	No
	Labour Code of British Columbia						
MANITOBA	Civil Service Act	No	No	No	No	No	No
	Labour Relations Act	No	No	n/a	No	No	No
NEWFOUNDLAND	Public Service (Collective Bargaining) Act	No	No	Yes	Yes	Yes	Yes
	Labour Relations Act	No	No	n/a	No	No	No
NEW BRUNSWICK	Public Service Labour Relations Act	No	No	Yes	Yes	No(4)	No(4)
	Industrial Relations Act	No	No	n/a	No	No	No
NOVA SCOTIA	Civil Service Collective Bargaining Act	No	No	Yes	Yes	Yes	Yes
	Trade Union Act	Yes	Yes	n/a	Yes	Yes	Yes
PRINCE EDWARD ISLAND	Civil Service Act	No	No	Yes	No	No	No
	Labour Act	Yes	Yes	n/a	Yes	Yes	Yes
QUEBEC	Labour Code(5)	No	No	Yes	Yes	No	No
SASKATCHEWAN	Trade Union Act(6)	No	No	No	No	No	No

NOTES

1. Lawyers employed in the Department of Justice specically excluded.

2. All professions have right to opt-in to the bargaining unit.

3. A negotiated agreement covering salaries, benefits and working conditions exists between the government and its medical doctors.

4. Medical doctors and dentists have not exercised their right to become certified.

5. Labour Code applies to both public and private sectors. Prosecutors in the Department of Justice are specifically excluded under the Code.

6. Trade Union Act applies to both the public and private sectors. Under the collective agreement between the government and the Saskatchewan Government Employee's Association, the parties have agreed to exclude members of the engineering, medical and dental professions and OIC appointments. Lawyers are such appointments.

Staff Relations and Compensation Division
Human Resources Secretariat

April 30,1986

ONTARIO

Scientific and professional employees such as nurses, foresters, psychologists, librarians, etc., have collective bargaining rights under the Crown Employees Collective Bargaining Act. However, persons who are members of the architectural, dental, engineering, legal or medical professions and who are entitled to practise in Ontario and who are employed in a professional capacity, are specifically excluded under subsection 1(1) of the Act.

Scientific and professional classifications subject to bargaining under the Act are assigned to occupational groups within a Scientific and Professional Category. This category, along with seven other categories, represents a single bargaining unit covering all employees in the Ontario Public Service. Employees in the unit are represented by one bargaining agent, the Ontario Public Service Employees Union. While wage rates are negotiated category by category, employee benefits and working conditions are negotiated on a bargaining unit-wide basis. The Act specifies compulsory arbitration as the dispute resolution mechanism.

Although members of the medical profession are exempt from bargaining under the Act, the government in 1980 entered into an agreement with the Ontario Psychiatric Hospitals and Hospital Schools Medical Staff Association concerning salaries for physicians and psychiatrists who provide direct patient care in government-run hospitals. No statutory provision exists to cover the agreement or the related discussion process. The agreement provides for the appointment of a factfinder should negotiations on salaries reach an impasse. The terms of reference under

the agreement restrict the factfinder's investigation to salary issues only. Recommendations made are not binding on either party. The final determination of salary increases and any other changes rests with Management Board of Cabinet.

Salary concerns and other related matters affecting architects, engineers, dentists, lawyers, and those medical doctors who are not employed in a direct patient care capacity, are dealt with as part of the normal process applicable to the review of management and excluded staff salaries. Although a staff association of crown attorneys in the Ministry of the Attorney General has made representations to the govenment from time to time on matters of concern to them, no formal bargaining or discussion arrangement is provided.

Clause (a) of subsection 1(3) of the Labour Relations Act specifically excludes members of the architectural, dental, land surveying, legal and medical professions entitled to practise in Ontario and employed in a professional capacity. Under the Act, professional engineers have the freedom to join a trade union and bargain collectively. However, subsection 6(4) of the Act requires that professional engineers comprise a separate and distinct bargaining unit unless the Labour Relations Board is satisfied that a majority of the engineers wish to be included in a bargaining unit of other employees. There are no restrictions on the bargaining rights of other scientific and professional employees.

FEDERAL GOVERNMENT

Under the Public Service Staff Relations Act, all scientific and professional staff, including architects, engineers, dentists, medical doctors, and lawyers have the right to bargain. These scientific and professional groups are certified by the Public Service Staff Relations Board amd each form separate bargaining units within the Scientific and Professional Category of the federal public service Classification Plan. While the Professional Institute of the Public Service of Canada is the certified bargaining agent for the majority of groups in the category, a few groups are represented by the Public Service Alliance of Canada or independent staff associations.

Separate collective agreements covering wages and those working condition and employee benefit items that are barguinable under the Act, are negotiated for each group. The Act permits strikes and lock-outs to take place to resolve a bargaining impasse. The legislation also contains a provision whereby a party can ask the Board to refer a dispute to binding arbitration. The request must be made prior to any strike or lock-out action being taken. The request for arbitration does not need to be by mutual agreement.

Although lawyers employed in the federal public service have the right to bargain, legal staff in the Department of Justice are excluded under the Act. Specific reference to these employees is made in the statute under the definition that excludes persons employed in a "managerial or confidential capacity". As of September 1985, only 30 lawyers were covered by the Law group collective agreement while some 761 lawyers were excluded.

In comparison, inclusion/exclusion figures for the engineering, medical, dental and architectural groups were;

Group	Inclusions	Exclusions
Architecture and Town Planning	354	30
Engineering and Land Surveying	2730	250
Medicine	229	86
Dentistry	44	1

The Canada Labour Code places no restriction on employees who are members of the architectural, engineering, dental, medical or legal professions from belonging to a trade union.

ALBERTA

While scientific and professional employees have the right to bargain and to belong to a single bargaining unit covering all Alberta government employees, subsection 22(1) of the Public Service Employee Relations Act specifically excludes from the bargaining unit persons who are members of the architectural, dental, engineering, legal and medical professions who are practising their profession as a condition of employment. However, subsections 22(2) and 22(3) of the Act allow an "opting-in" and an "opting-out" arrangement for these excluded professions. The Public Service Staff Relations Board may direct that members of the professions be included in the bargaining unit if a majority of persons in the profession express such a desire. The Board may also direct that members

of the professions be opted-out, if at a later date they do not wish to remain in the unit. Only members who would not be excluded under the general exclusion criteria (i.e. managerial or confidential capacity) can express the preference to opt in or out. At the present time, architects, engineers, dentists, lawyers and medical doctors have chosen to remain excluded from the bargaining unit. None of the excluded professions have formally requested inclusion in the bargaining unit although from time to time some employees have expressed an interest. If a profession did opt for inclusion, it would have to become part of the single bargaining unit covering provincial employees and have to accept the Alberta Government Employees' Union as its bargaining representative. Compulsory arbitration to resolve disputes is provided for under the Act.

Informal discussions regarding salaries and other terms and conditions of employment are held with medical doctors at the ministry level Recommendations on changes resulting from these discussions can be accepted or rejected by the government. Only twelve doctors, representing all levels of work, are involved in the departmental discussion process. Most medical doctors required by the Alberta government for direct patient care are retained on a fee-for-service arrangement and are therefore not employees.

Subsection 1(1) of the Labour Relations Act specifically exempts from a bargaining unit persons who are practising members of the medical, dental, architectural, engineering and legal professions.

BRITISH COLUMBIA

Under the Public Service Labour Relations Act all scientific and professional employees have the right to bargain except persons who are qualified under the Barristers and Solicitors Act and persons who are qualified under the Medical Practioners Act and who are engaged and working in the practice of their profession. Section 4 of the Act establishes separate bargaining units for (a) licensed and registered nurses, (b) licensed professional staff, and (c) the balance of the public service. At the present time the licensed professional bargaining unit includes architects, engineers, dental officers and other professional groups.

While medical doctors are specifically excluded by statute, the province has a formal agreement with its doctors covering salaries and related terms and conditions of employment. The British Columbia Medical Association represents the doctors and provides negotiation and administrative support services. Medical doctors at all levels, including management, are covered by the agreement. While salaries, working conditions and benefits are subject to negotiation, the agreement does not contain a dispute resolution mechanism should an impasse arise in negotiations. Final determination on changes rests with the government. Although the medical association is the bargaining agent, the Association has tended to separate bargaining for provincial government employed doctors from fee-for-service negotiations. However, in 1981 when the provincial government doctors went out out "on-strike", the Association used the fee-for-service negotiations at the time as leverage to obtain a favourable settlement for the doctors. The agreement between the province and its medical doctors serves as a guide for salaried doctors employed by other public and private organizations in the province.

There are no similar bargaining or formal discussion arrangements with crown attorneys and lawyers.

Under the British Columbia Labour Code, qualified and practising members of professions are allowed to bargain collectively. Prior to 1975, the Code excluded such persons from bargaining.

MANITOBA

All scientific and professional employees have bargaining rights. A single bargaining unit, with the Manitoba Government Employees' Association as the bargaining representative covers all provincial government employees except those who are professional engineers, lawyers, and medical doctors. Separate bargaining units for engineers and medical doctors have been certified under the Labour Relations Act while the provincial government has voluntarily recognized the crown attorney's association. Architects and dentists are covered by the master agreement with the MGEA. Although the Civil Service Act is silent with respect to the dispute resolution mechanism it has been the practice to use arbirtration to resolve disputes involving employees covered by the master agreement. The professional groups certified under the Labour Relations Act are allowed to strike.

The Manitoba Medical Association is the bargaining agent for medical doctors employed by the province while engineers are represented by the Organization of Professional Engineers Employed by the Province of Manitoba. The bargaining units were certified by the Labour Relations Board in 1974 and 1975 respectively. Under the Labour Relations Act both groups are allowed to strike. Negotiations have been kept separate from

fee-for-service negotiations between the government and the Manitoba Medical Association. The Association has primarily provided administrative and research support with the medical doctors retaining their own legal counsel to represent them in negotiations.
The agreement with the Crown Attorneys covers some 80 crown attorneys and 25 other legal staff at all job levels. The agreement provides for a tri-partite board of arbitration, or a sole arbitrator by mutual agreement, to resolve an impasse in negotiations. The Chief Justice of the Province of Manitoba appoints an arbitration board chairman if the parties cannot agree on a mutually acceptable person.

Under the Labour Relations Act there is no restriction on the right to bargain by employees who are members of the various professions.

NEWFOUNDLAND

Under the Public Service (Collective Bargaining) Act, scientific and professional employees including architects and engineers have the right to bargain. Medical doctors, dentists and lawyers are excluded under the Act. While the Act permits strike action to be taken, legislation introduced in 1983 places limitations on such action.

The Labour Relations Act places no restriction on employees who are members of various professions to unionize and bargain collectively.

NEW BRUNSWICK

Under the Public Service Labour Relations Act, all scientific and professional employees except legal officers employed under the Attorney General have the right to bargain. Bargaining units are certified on a group basis and form the scientific and professional category. Professional engineers and architects are certified bargaining units. Medical doctors and dentists, while having the right to bargain, have not made formal application as a group to become certified. Some 10 years ago, the Public Service Staff Relations Board, without providing reasons, turned down the application for certification made by a group of hospital psychiatrists. At the time, the employer argued that certification of a bargaining unit had to represent a majority of all eligible doctors in the province's employ, not just a few. The statute permits strike/lock-out to resolve disputes. It also provides for an arbitration option. However, the selection of arbitration has to be by mutual agreement. This later requirement has a significant impact on the bargaining position of the parties. Since many of the professional groups lack strong economic and/or political power, they favour arbitration over striking. The employer, by refusing arbitration, is able to gain considerable bargaining leverage and achieve settlements in direct negotiation because of the reluctance of professionals to take strike action.

Legal officers employed under the Attorney General are specifically excluded as a person employed in a managerial or confidential capacity. They have a staff association and it makes its views known to Treasury Board on salaries and terms of employment through the Deputy Attorney General and the Attorney General. No formal discussion process exists with the association.

Senior management in the Department of Health regularly meet with medical doctors to discuss matters of mutual concern. Salary and working condition issues arising from these meetings are transmitted to Treasury Board through normal ministry channels. Recently, it has been the policy of the government to grant increases in salary to its medical doctors that correspond to the adjustments made in the fee-for-service schedule.

The Industrial Relations Act does not prevent scientific and professional employees from forming a bargaining unit. The Act defines "employee" as a person employed to do skilled or unskilled manual, clerical, technical or professional work.

NOVA SCOTIA

While scientific and professional staff, including professional engineers and architects, are included in a Professional Category bargaining unit, Section 11 of the Civil Service Collective Bargaining Act specifically excludes employees who are members of the medical, dental, and legal professions and who are qualified to practise and are employed in that capacity. A separate collective agreement is negotiated for the category. Compulsory arbitration is the dispute resolution mechanism. Employees who are members of the medical, dental, architectural, engineering, and legal professions qualified to practise under the laws of a province and employed in that capacity are excluded from bargaining under the Trade Union Act.

PRINCE EDWARD ISLAND

Section 40 of the Civil Service Act provides the framework for collective bargaining in the Prince Edward Island public service. The Act designates the Prince Edward Island Public Service Association as the bargaining representative for all employees covered by the Act and not excluded by regulation. All scientific and professional staff, including employees who are members of the architectural, engineering, dental, medical and legal professions have collective bargaining rights except those lawyers who are solicitors employed in the Department of Justice. All employees are included in a single service-wide bargaining unit. Compulsory arbitration is the dispute resolution mechanism.

The Labour Act of Prince Edward Island specifically designates as exclusions persons who are practising members of the architectural, dental, engineering, legal or medical professions.

QUEBEC

The Labour Code governs both public and private sector labour relations in the province. It is applicable to provincial government employees. The Code places no restriction on the right of employees of professional organizations from forming a union and to bargain collectively. A Professional Category covers the various scientific and professional groups in the Quebec public service. A separate collective agreement is negotiated for the category. The right to strike exists as a mechanism to resolve disputes.

While architects, engineers, dentists, medical doctors, and lawyers have the right to bargain, the Code specifically exempts prosecutors employed by the Quebec Department of Justice. Prosecutors and other legal staff up to the level of Deputy Minister belong to a staff association. The concerns of the members of the association with respect to salaries and terms and conditions of employment are made known to the President of Treasury Board by the Minister of Justice. The ability of the association to have their concerns considered by the government rests very much on the fact that all persons involved, including the Minister of Justice, are lawyers. Bargaining rights have not been a major concern of the association.

Some 25 associations representing different types of management and excluded employees such a foremen, directors of education, hospital administrators, etc., are found in the public sector at-large. These associations cover some 25,000 persons. A "Confederation" acts as a co-ordinating and governing body. Membership in the respective associations is voluntary. The associations meet and present briefs to the President of Treasury Board and/or the Premier once a year.

SASKATCHEWAN

The Trade Union Act governs labour relations in both the public and private sectors, and is applicable to the Crown. Under the Act there is no restriction on the right of employees who are members of a professional organization from joining a trade union.

The inclusion/exclusion of employees of the provincial government is by agreement of the parties rather than by statute. Article 2 of the collective agreement between the government and the Saskatchewan

Government Employees' Association sets out the exemptions from coverage under the agreement. Persons who are (a) registered members of the Association of Professional Engineers of Saskatchewan and Engineers-in-training, (b) members of the Saskatchewan Land Surveyors Association (c) physicians and dentists are listed as exclusions. The Article also provides for the exclusion of Order-in-Council appointments and as a result, legal officers and crown attorneys are excluded. Professional architects along with other scientific and professional employees are <u>included</u> in the single bargaining unit covering all Saskatchewan government employees. The right to strike is permitted under the Trade Union Act.

Staff Relations and Compensation Division

April 30,1986

IN THE MATTER OF A CONCILIATION BOARD HEARING

BETWEEN: THE GOVERNMENT OF ONTARIO .

AND: THE ONTARIO PSYCHIATRIC HOSPITALS AND HOSPITAL SCHOOLS MEDICAL STAFF ASSOCIATION

RE: BARGAINING RELATIONSHIP AND PROCESS

BOARD OF CONCILIATION:	Kevin M. Burkett	- Chairman
	Frank C. Burnet	- Government Nominee
	Chris Paliare	- Association Nominee
APPEARANCE FOR THE GOVERNMENT:	F. G. Hamilton, Q.C.	- Counsel
APPEARANCE FOR THE ASSOCIATION:	Jeffrey Sack, Q.C.	- Counsel

A hearing was held in Toronto on June 20, 1986.

November 27, 1986

R E P O R T

1. These proceedings arise from a Memorandum of Agreement signed between the parties on March 21, 1986. The Memorandum of Agreement provides, in part, that:

> "1 (a) A Board of Conciliation be established to inquire into and make non-binding recommendations with respect to salaries, working conditions and the processes under which these matters are to be determined. The working conditions that are to be inquired into are:
>
> (i) workload; administrative, clinical and teaching
>
> (ii) improved secretarial assistance
>
> (iii) workplace safety
>
> (iv) education leave
>
> (v) legal representation
>
> (vi) the mechanism for addressing workplace concerns.

2. The Association was formed in 1973 to represent the medical staff at the Ontario Psychiatric Hospitals. The Association was incorporated under the Ontario Corporations Act in 1979. Presently the Association represents some 280 psychiatrists, physicians and dentists employed by the government of Ontario at 10 provincial psychiatric hospitals operated by the Ministry of Health and 6 mental retardation facilities operated by the Ministry of Community and Social Services. There are 90 physicians who are members of the classified Civil Service of which 56 are psychiatrists and 34

are general practitioners. In addition there are 151 physicians employed under contract of which 107 are psychiatrists and 44 are general practitioners. The terms and conditions of employment of the medical staff of these provincial institutions are governed by the Public Service Act and Regulations. Under that act the public service consists of both classified employees (civil service) and classified employees (ministerial appointments). Salaries and work conditions of positions in the classified service are prescribed by the Civil Service Commission which is responsible to the Chairman of Management Board. The terms and conditions of the unclassified staff are contained in individual contracts of employment.

3. The medical staff of these institutions is excluded from the Crown Employees' Collective Bargaining Act since the term "employee" in that Act does not include persons who are members of the medical profession entitled to practise in Ontario and employed in a professional capacity: section 1(f)(4). On the same basis, the medical staff is excluded from the operation of the Labour Relations Act: section 1(3)(a); in any event, the Labour Relations Act does not apply to the Crown or its employees. Nor is the medical staff covered by the Hospital Labour Disputes Arbitration Act since that Act applies only to hospital employees to whom the Labour Relations Act applies: HLDAA, section 2.

4. The Association bargained with representatives of the Ministries of Health and Community and Social Services on

an informal basis in the period 1975-1980. In 1980 a framework agreement entitled "Salary Negotiation for Specified Staff Physicians" was negotiated. The agreement provided as follows:

"1. A Joint Negotiating Committee will be established to negotiate salary levels and standby pay for specified staff physicians employed in psychiatric facilities operated by the Ministry of Health and in facilities governed by the Developmental Services Act and Children's Mental Health Services Act and operated by the Ministry of Community and Social Services.

2. The Joint Negotiating Committee will have the following membership:

5	representatives	of	the	Ontario Psychiatric Hospitals & Hospital Schools Medical Staff Association and the Ontario Medical Association
3	"	"	"	Ministry of Health
1	"	"	"	Ministry of Community & Social Services
1	"	"	"	Civil Service Commission.

3. Negotiations will include salary and standby pay for the classes of PMD-20 and PMD-22.

4. After agreement is reached under 3 above, the Joint Negotiating Committee will also consider the salary of the PMD-23 class, the basic listed contract salary rates for Category II and III psychiatrists and contract physicians and sessional fees paid for medical services rendered in the facilities listed in 1 above.

5. Vacations and other benefits will be considered by the Joint Negotiating Committee at the request of either party.

6. Matters included under items 4 and 5 above will not come within the jurisdiction of the fact-finder.

7. Either party may initiate the negotiation process within five months prior to the end of the fiscal year.

8. The Joint Negotiating Committee will consider submissions presented by the Associations prior to the April 1 review date and will endeavour to formulate a joint recommendation acceptable to the respective principals. If the Joint Negotiating Committee agrees, matters included under 4 and 5 above will be included as part of the final recommendation to the principals.

9. If no agreement is reached under 3 above, a fact-finder shall be appointed by mutual agreement of both parties. Where there is no agreement, a fact-finder will be appointed by the Chairman of the Ontario Labour Relations Board by February 15, or a later date agreed to by the parties.

10. The remuneration of the fact-finder will be shared equally by the parties.

11. The fact-finder will consider the information provided by the parties and make a recommendation to the Joint Negotiating Committee with respect to salaries of the PMD-20 and PMD-22 classifications, and standby pay. This recommendation will be made within four weeks of his/her appointment.

12. The Joint Negotiating Committee will then consider the fact-finder's recommendations and again endeavour to formulate a joint recommendation that will be acceptable to the respective principals.

13. If the committee reaches an agreement, it shall recommend acceptance of the agreement to the respective principals.

14. Either party may make public the recommendation of the fact-finder after seven (7) days of its receipt by the committee provided that the other party is given two (2) working days' advance notice.

15. This negotiating mechanism will be effective for a two-year period from November 1, 1980, and subject to review at the completion of the second year.

5. Under the framework agreement fact-finder reports were issued by Professor E. E. Palmer in 1981 and again in 1982 by Professor Arthur Kruger. Professor Kruger's recommendations spanned the period 1982-83 and 1983-84. Both fact-finders were of

the view that for purposes of salary determination the relationship of these physicians with other physicians was more relevant than the relationship with senior civil servants "whose training and work is so different from the physicians' ". The government would not accept the salary recommendations made by Professor Kruger. A third fact-finding report was issued by Mr. J. C. Wilson. The Association, which had become increasingly disenchanted with the bargaining process, in particular the absence of a final impartial dispute resolution mechanism, proposed a binding arbitration process covering all terms and conditions of employment. The fact-finder made these comments in respect of the bargaining process:

> "I would fail to be forthright in my advice if I did not point out at the outset of this Report that the negotiation process leading to the function of the Fact-Finder has become questionable.
>
> There are two fundamental problems with the present process. First, the Government directive of October, 1980, which authorized the process makes little sense unless it can be considered to have specifically identified the Psychiatrists as a separate negotiating entity within the Ontario public service. Despite that, however, in the present negotiations the Government has been quite clear with the Psychiatrists that it cannot consider any agreement which would constitute a departure from its position with the other professional groups. This suggests that in fact the Government is not prepared to negotiate with the Psychiatrists as a separate entity.
>
> Secondly, the mandate of the Joint Negotiating Committee limits the Committee's range of consideration to salary and standby pay - that is, the cash components only of compensation. It is reasonable to point out that generally accepted practice in compensation questions includes the terms and conditions of employment as an integral part of compensation negotiations. The

Psychiatrists appear to be expected to negotiate any other employment conditions which might directly impact on compensation levels in entirely separate discussions with the Ministry of Health. This arrangement clearly limits the possibility of effective negotiation.

Any government must of course be free within the applicable constitutional limits to take whatever position it considers to be necessary in the public interest. Since there appears to be no written commitment by the Government to continuation of the mandate of the Joint Negotiating Committee, it is reasonable to suggest that if the Government cannot justify identification of the Psychiatrists as a separate negotiating entity, nor permit sufficient breadth of mandate to permit effective negotiation, it should abandon this process for some more suitable alternative. It serves nothing here to hold to an illusory prospect.

I have submitted the recommendations of this Report on the assumption that the present process can be made satisfactorily flexible in the future.

6. The government's unilateral imposition of a 4% pay increase prior to the release of the fact-finder's report led to work to rule action and a refusal to accept transfers to these provincial institutions from general hospitals with psychiatric units. In December, 1985 the Association met and adopted a motion calling for independent and binding arbitration and authorized the Association executive to schedule study days in the event of a continued impasse. The Ministry accepted the compensation portion of the fact-finder's report and proposed discussions with respect to process. The result was a series of study days followed by a strike vote on March 18, 1986. The threatened strike was averted with third party assistance when the parties entered into the above-noted memorandum of settlement dated March 21, 1986; the same memorandum which gives us our authority to recommend in this matter.

7. There is currently underway an interministerial review of the bargaining procedures for all of the professionals employed by the Ontario Government. Those who are affected by this review are some 29 architects, 803 engineers, 532 crown attorneys, 26 dentists and 199 medical doctors of which 125 are classified. They are employed in a number of different ministries. The psychiatrists and other physicians and dentists represented by the Association in these proceedings are the only group to have engaged in a formalized bargaining process with the Government. It is understood between the parties that our recommendations with respect to bargaining process will be considered by the Government along with the recommendations that are handed down by the interministerial committee.

8. At the hearing which took place on June 20, 1986 the Association took the position that we should limit ourselves to the question of process and then dispose of questions relating to terms and conditions of employment by recommending that those questions be dealt with under whatever bargaining process is recommended. The Goverhment objected, arguing that we had been constituted to consider and make recommendations with respect to the specified terms and conditions of employment and, therefore were obliged to consider these matters on the merits. The Government maintains that because the two questions are separate and distinct, and because we do not have the authority to make a binding award with respect to process, and because of the time lapse that will be occasioned by the need to study and consider our recommendations with respect to process along with those

that will be forthcoming from the interministerial committee, there is no reason to delay considering and making recommendations with respect to the specified terms and conditions of employment that are referred to us. We made an oral ruling at the hearing that we accepted the Government's position and would commence by hearing the submissions with respect to process first. These submissions were completed on the first day of hearing.

9. The Association proposes a system that it refers to as "fair, independent and binding" arbitration. The specifics of its proposal are set out below:

"1.1 The Agreement shall be effective from January 1, 198 through December 31, 198 . Either party may notify the other in writing at any time of its desire to negotiate with a view to the renewal with or without modification of the existing Agreement.

1.2 In the event of notification being given in accordance with paragraph 1.1, the parties shall meet within twenty (20) days for the purpose of negotiating a new Agreement or renewing this Agreement.

1.3 If the parties are unable to reach an agreement, the current Agreement shall be extended without modifications until the conditions contained in the following paragraphs have been satisfied.

1.4 The process for resolving all future contract negotiations disputes shall be binding under The Arbitrations Act, R.S.O. 1980, as amended:

(i) In the event that negotiations do not result in agreement, either party may at any time after thirty (30) days of the first meeting, or such shorter period as may be mutually agreed upon, submit all matters in dispute to arbitration, and for this purpose this agreement constitutes a submission under The Arbitrations Act, R.S.O. 1980, c.25, as amended.

(ii) Each party shall appoint a member to the Board, and the third member, who shall be the Chairperson, shall be appointed by the two members so appointed.

(iii) Where either party fails to appoint a member to the Board within thirty (30) days, the Chief Justice of Ontario may be requested in writing by the other party to appoint a member in lieu thereof, and such appointment shall be made within fifteen (15) days of the said request.

(iv) Where the two members of the Board appointed by the parties fail, within fifteen (15) days of the appointment of the one last appointed, to agree upon a third member, the Chief Justice of Ontario may be requested in writing by either party to appoint a third member, and such appointment shall be made within fifteen (15) days of the said request.

(v) The Board shall commence its proceedings within thirty (30) days after it is constituted and shall deliver the award within sixty (60) days after the commencement of the proceedings, and the award shall be final and binding on the parties.

(vi) Any of the periods mentioned herein may be extended at any time by agreement of the parties in writing.

(vii) The Board shall examine into and decide on the matters in dispute. The Board shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions.

(viii) The Board shall have jurisdiction to determine all terms and conditions of employment including salaries, benefits and working conditions and all rights, privileges or duties of the employer, the Association and the medical staff.

(ix) The decision of the majority of the members of the Board is the decision of the Board, but, if there is no majority, the decision of the Chairperson is the decision of the Board.

(x) Each party shall assume its own costs, including those of its appointees, and shall share the cost of the fees and expenses charged by the Chairperson equally.

(xi) The provisions of this Agreement shall remain in effect, unless amended by agreement of the parties, and until replaced by a new Agreement or an award.

(xii) Within sixty (60) days following an award hereunder, the parties shall incorporate the terms of the award in an Agreement, failing which this Agreement, as amended by the award, shall be deemed to constitute the Agreement between the parties.

(xiii) The foregoing provisions in this article are intended to establish a mechanism for the resolution of all future differences between the parties, for the next and all subsequent years, and the Board shall have no jurisdiction, except upon the agreement of the parties, to amend, modify, alter or delete any of the said provisions and no request to amend, modify, alter or delete any of the foregoing provisions in this article shall be made to the Board by either party.

10. The Association's argument in support of a system of binding arbitration is straightforward. The Association submits that it is government policy to provide binding arbitration wherever essential services are provided. The Association points to the provision of binding arbitration for police, fire, nursing home and hospital services and, in particular, to the fact that interns and residents, nurses, support staff, and professional and technical employees at the very institutions involved in this dispute are all subject to binding arbitration as the ultimate dispute resolution mechanism. The Association submits that "it makes no sense for interns and residents to have access to arbitration, on the basis that they are essential, while the very physicians whom they assist, and who supervise them, do not". The Association

suggests as well that it is anomalous that psychiatrists in Ontario employed in federal institutions have access to binding arbitration, while psychiatrists in provincial institutions do not. The Association characterizes this issue as the most important factor prompting the work action and threatened withdrawal of services that was resolved on the basis of the memorandum of agreement giving us our authority to act. In asking us to recommend binding arbitration the Association asserts that there has been a consistent refusal by the Government to negotiate working conditions and an outright rejection of the last fact-finder's conclusion that a new negotiating process be devised. The Association maintains that the fairness of the procedure it proposes is guaranteed by the tripartite constitution of the Board, its independence by the provision for appointment of a chairperson by the chief justice if necessary, and its binding nature by the reference to the Provincial Arbitrations Act.

11. The Government finds itself in a somewhat anomalous situation. The Government is committed to considering the recommendations of this Board before acting on the question of bargaining procedure for all of the professions. However, as we have observed, that question is presently before an interministerial committee. If the Government was to make recommendations to us, therefore, which mirrored the thinking of the interministerial committee, to which it is privy, and, if these recommendations were to be rejected by us but subsequently acted upon, the Government could be accused of not

keeping the commitment to the psychiatrists to consider our recommendations before acting. The Government, therefore, opted to discuss the various problems associated with formulating a bargaining process within the Ontario public service for this particular profession, without making specific recommendations.

12. The Government submits that the most sensitive matter affecting public policy in these proceedings is whether the unique role occupied by physicians, including the psychiatrists employed by it, can be reconciled within the framework of a collective bargaining structure. The Government characterizes the question as whether society is prepared to share with an independent organization such as a trade union, with its own code of conduct and discipline, responsibility for the trust bestowed upon the members of the medical profession in their personal involvement in patient care. It is submitted that in the face of the multifaceted relationship that the psychiatrists have with the Government as their employer, the College of Physicians and Surgeons, the Health Disciplines Board of the Province of Ontario, committees of their respective hospitals, a university if engaged in teaching and, most importantly, the patient, their situation is not susceptible to a rational accommodation with a system of collective bargaining which is predicated upon a one-on-one contractual relationship. The Government comments that the core functions normally pertinent to collective bargaining

have been pre-empted by legislation. By way of illustration it asks how a grievance procedure or the principle of seniority can be realistically applicable when the most sensitive consequences of their application are governed by parties who are extraneous to the process. While the matter of compensation could clearly be bargained, the Government points out that compensation and the other substantive conditions of employment are interrelated for bargaining purposes. The Government maintains, therefore, that "the wisdom of a collective bargaining regime for the psychiatrists is indeed very questionable".

13. The Government points to a number of difficult issues that would have to be resolved in order to provide the psychiatrists, as one professional group within the Ontario public service, with collective bargaining. The first such issue relates to the description of the appropriate bargaining unit. Should the psychiatrists bargain as part of the already existing scientific and professional services category of some 4000 employees including research scientists, education officers, economists, and psychologists? Should the psychiatrists bargain as part of an all-professional bargaining unit? Should the psychiatric physicians bargain as part of an all-physicians group, or should they bargain alone? The second issue raised by the Government pertains to the status of the representing organization. The Government submits that the representing organization would have to be an "employee organization" as that term is commonly defined in labour

relations legislation and, in addition, there would have to be some requirement of constitutional guarantee of democratic freedom and fitness to fulfill the mandate sought and some process to deal with the acquisition and loss of bargaining rights. The third issue referred to by the Government is the scope of negotiable issues. The Government points out that under the Crown Employees' Collective Bargaining Act there is legislative regulation of matters that are bargainable together with an articulation of functions that are exclusively the prerogative of the employer. The Government submits that the licensing and regulatory bodies will also have a substantial impact in prescribing and limiting bargainable or grievable matters and, in addition, depending on the scope of the bargaining unit, a number of insurance and welfare benefits, including superannuation programs, would not be feasible for a civil service fragmented into small bargaining units. The Government also lists the right to strike, grievance rights determination and authority and criteria for managerial exclusions as other contentious issues. The Government concludes by reminding us that while the Association may have a viewpoint on these various issues other organizations and employees may have differing or conflicting views which deserve consideration before any conclusions are reached.

14. The first matter to be disposed of is the suggestion that because of the statutory regulation of the profession collective bargaining is not appropriate for government-employed physicians. We start by confirming that these physicians,

as employees of the Government, as distinct from self-employed practitioners, have a whole range of employment considerations that are unaffected by the statutory regulation of the profession, which are appropriate for collective bargaining. I refer specifically to salary, benefits, hours, premiums and vacations, among others; not unimportant employment matters. There are other aspects of the employment relationship such as the application of seniority and/or the procedures to deal with employment complaints which, although there may be certain statutory restrictions or parallel procedures, are nevertheless bargainable. The existence of a statutorily established "complaints committee" to consider and investigate complaints made by members of the public or the profession or a statutorily established "discipline committee" to hear and determine allegations of professional misconduct or incompetence does not rule a grievance procedure to resolve employment-related complaints. The potential for overlapping authority has not restricted bargaining agents for nurses, teachers and police, who are also subject to statutory bodies that deal with complaints made by members of the public and/or allegations of misconduct or incompetence, from negotiating contractual grievance procedures. University faculty, who now bargain collectively, are also in a somewhat analogous situation. There is no statutory prohibition against government-employed psychiatrists engaging in the process of collective bargaining with their employer and clearly, notwithstanding the statutory overlap, the scope of matters that may be bargained would, in our view, permit meaningful collective bargaining. Indeed, in our view the already existing process,

notwithstanding its flaws, recognizes the viability of a bargaining relationship.

15. If there is any doubt that collective bargaining is an appropriate mechanism for employee physicians, reference need only be had to the extension of collective bargaining to the interns and residents who work in Ontario hospitals, including the Ontario Government psychiatric hospitals where they work under the psychiatrists who are the subject of this inquiry. The interns and residents are subject to the same statutory framework as the psychiatrists who are employed by the Ontario Government. They negotiate under a process that provides for binding arbitration under the Arbitrations Act as the final method of dispute resolution. Under their collective bargaining process the Board of Arbitration is given jurisdiction "to determine terms and conditions of employment including salaries, benefits and working conditions, subject to the specific exclusion of hours of work including any penalties or bonuses arising from hours of work or training. The Board (does) not have jurisdiction to determine matters which are primarily educational, provided that employment aspects of such matters (are) subject to arbitration where they can be dealt with separately and where to do so would not adversely affect clinical education." Similarly, the psychiatrists employed by the federal government who work in Ontario and are also subject to the same statutory framework as the psychiatrists employed by the Ontario Government

engage in collective bargaining under the Public Service Staff Relations Act. Clearly, collective bargaining is not an inappropriate process for physicians who are also employees. The process is one that can operate within the statutory framework that governs the medical profession in the Province of Ontario and, therefore, cannot be rejected on grounds that "the matrix of parties, regulatory controls and procedures resulting from this division of interests, rights, responsibilities, obligations and remedies, is not susceptible to a rational accommodation within a system of collective bargaining which is predicated upon a one-on-one contractual relationship".

16. The essential question that follows relates to the form of the bargaining process. We concur in the comments of fact-finder Wilson with respect to the inadequacies of the existing process. In our view any bargaining process that encourages negotiation and provides for third party involvement but leaves the ultimate decision-making authority to the employer will eventually result in the dissatisfaction of the employees. In order for a process of collective bargaining to accommodate the legitimate aspirations of both the employer and the employees, in the sense that the terms of the employment relationship are not dictated by one side the other, the ultimate method of dispute resolution must be left to the relative bargaining strength of the parties or, in those instances where the public interest dictates that the individual parties not be permitted to resort to strike

or lockout, to the determination of a neutral third party. This underlying reality has been recognized by the Ontario Government. The preamble to the Ontario Labour Relations Act, which provides the right to free collective bargaining generally in the province, reads:

> "Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Where the provincial government has determined that employees provide essential services provision has been made for binding arbitration. I refer specifically to police, fire, government and hospital employees. Governments in Canada, including the Ontario Government, have not declared themselves supreme in their dealings with their employees. Free collective bargaining, abridged to the extent of substituting binding arbitration for the right to strike or lockout where essential services are provided, is the norm. Against this backdrop it is difficult to argue that the psychiatrist who are employed in hospitals where all of the other employees are designated as essential and subject to binding arbitration, should be treated differently. They should be declared essential and made subject to compulsory binding arbitration as the final method of dispute resolution. The government does not contest that the servic provided by the psychiatrists, physicians and dentists in these proceedings are essential and there was ample evidence at the hearing to support the essentiality of these employees.

17. Having rejected the suggestion that collective bargaining is inappropriate for government-employed psychiatrists, and having come to the conclusion that, as hospital employees, the ultimate method of dispute resolution must be binding arbitration, the

problems raised by the Government with respect to the scope of the bargaining unit, the status of the representing organization, and the extent of the matters to be bargained, although they must be resolved, are ancillary. They are matters that are normally dealt with in any application for certification before the parties commence to bargain. However, they are not matters that justify a refusal to recognize a collective bargaining relationship.

18. The Government has enumerated a number of possible bargaining units. The suggestion that the psychiatric physicians could bargain within the existing 4000-employee professional and technical category must be rejected for the reasons enunciated by the Government in support of its contention that collective bargaining may not be appropriate for government-employed psychiatric physicians. While these arguments do not support the conclusion that collective bargaining is inappropriate, they do cause us to conclude that the government-employed psychiatric physicians do not share a sufficient community of interest with other government employees not subject to the same statutory controls and restrictions. For essentially the same reasons physicians do not share a sufficient community of interest with other professionals. The statutory framework that governs each of the professions is unique to the individual profession, thereby requiring, for each profession, a separate accommodation with collective bargaining. As importantly, it seems to us that each of the employee professions has its own set of work-related concerns that would be difficult to accommodate within a single bargaining unit. Even if some

accommodation could be reached between the professions, therefore, whereby representation rights extended across professional boundaries, which is problematic, collective bargaining would be most effective if carried out on a profession-by-profession basis. The difficulties that would arise if the professions were to be lumped together far outweigh the administrative advantages that might result from such a bargaining structure. In our view physicians should bargain together as a separate entity.

19. Although government-employed psychiatric physicians have bargained together as an autonomous unit in the past and would, in our view, constitute a viable bargaining unit, we would not be prepared to recommend that other government-employed physicians be excluded. The statutory framework is the same for all physicians, thereby laying the foundation for a shared community of interest, and the fragmentation that would result from separate physician units would weaken the bargaining power of the non-psychiatric physicians and create an administrative burden upon the employer that is difficult to justify.

20. We now turn to the question of whether both the classified and the unclassified physicians should bargain together. As we have noted, under the Public Service Act the public service consists of both classified employees (civil service) and unclassified employees (ministerial appointments). The salaries and working conditions of the

classified service are prescribed by the Civil Service Commission while the terms and conditions of the unclassified staff are contained in individual contracts of employment. In reality, the terms and conditions set out in the individual contracts of employment of the unclassified psychiatric physicians reflect what has been stipulated for the classified psychiatric physicians. We have been told that the individual physician has the option of being employed in the classified service or under an individual contract. The unclassified physicians receive a percentage in lieu of certain benefits that are provided to the classified service only. The unclassified psychiatric physicians work side by side with the classified psychiatric physicians performing the same functions in the same work environment. There are 90 classified psychiatric physicians and 151 unclassified psychiatric physicians employed by the Ontario Government. There can be no dispute that the classified and the unclassified psychiatric physicians share a strong community of interest. In our view the distinction between them is one of form rather than substance. Although the unclassified psychiatric physicians are party to individual contracts of employment, these can be bargained in light of and made subject to amendment on the basis of whatever changes are collectively negotiated. This is in essence what occurs presently. The two groups seek to bargain together and, in our view, there would be no real prejudice to the Government if they were to do so. On the contrary, the identity of interest between the two constitutes a compelling reason for recommending that they be included in the same bargaining unit. Indeed, a unit comprised of both staff and contract producers bargains effectively with the Canadian Broadcasting Corporation.

21. We accept the submission of the Government that the recognition of the Association for collective bargaining purposes would necessarily involve attainment of minimum standards normally required of an organization seeking certification to represent a bargaining unit of employees. These are commonly accepted prerequisites to the attainment of representation rights which serve to protect the rights of individual employees and to legitimize the status of the representing organization and, therefore, we recommend that the organization that seeks to represent government-employed physicians satisfy them. The task of determining if the organization that seeks to represent these employees meets the necessary prerequisites should fall to an independent adjudicative body such as the Ontario Labour Relations Board or the Ontario Public Service Labour Relations Tribunal. Indeed, depending upon the Government's ultimate decision with respect to collective bargaining for all of its professional employees, it is conceivable that a separate body could be established to certify the organizations seeking to represent each of the various professional groups. Without going further we endorse the Government's submission and leave it to the Government to decide who is to make the necessary determinations as to status and majority support. Beyond recommending that the assignment of jurisdiction to determine these matters be made as soon as is reasonably possible we do not consider the interim arrangements to be within our terms of reference. Indeed, neither party spoke to the matter of interim arrangements.

22. The final issue to be addressed is the question of the extent of the matters to be bargained. We start by endorsing the comments of fact-finder Wilson, as set out at paragraph 5 herein. Under the Crown Employees' Collective Bargaining Act there is legislative regulation of matters that are negotiable together with an articulation of the functions that are exclusively the prerogative of the employer. That Act stipulates as follows:

> "7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18 (1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development. 1974, c. 135, s. 3.
>
> 18. (1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,
>
> (a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and

(b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

While the extent of the matters that are open for bargaining is a subject of dispute between O.P.S.E.U. and the Government, it is our view that at this juncture government-employed physicians should be no better or no worse than other government employees. The dispute with respect to the extent of bargaining is one that they may wish to join but it is not one that we intend to influence. It is our recommendation, therefore, that they be given the same scope for bargaining as is provided under the Crown Employees' Collective Bargaining Act.

23. The Government is concerned that the statutory framework will have a substantial impact in restricting the bargainable or grievable matters set out in section 7 of the Crown Employees' Collective Bargaining Act. In addition the government submits that, depending on the scope of the bargaining unit, a number of insurance and welfare benefit programs would not be feasible for a Civil Service fragmented into small bargaining units. The government suggests that at the very least section 18(1) of the Crown Employees' Collective Bargaining Act would have to be amended to take into account the basic requirements of government in determining patient and institutional care levels. The negotiation of rates of

remuneration, hours of work, overtime and other premium allowances, the mileage rate, paid holidays, paid vacations, group life insurance, health insurance, long-term income protection, promotions, demotions, transfers, layoffs, re-appointments, grievance procedure, job evaluation system and leaves of absence, the subject matters for bargaining that are expressly articulated under article 7 of the Crown Employees Collective Bargaining Act, are all matters that are of acute interest to these government employed physicians and, although there may have to be a realization by the parties of the existen of regulatory legislation and indeed a realization that this unit is part of a much larger group of public servants (especia in respect of the negotiation of insured benefits), there is no statutory impediment to these matters being negotiated. Indeed, there are innumerable examples of relatively small bargaining un in both the private and public sectors, that negotiate within the confines of a large organization where economies of scale dictat that insured benefits and pension plans span various bargaining units and where the bargaining positions adopted by one or other of the parties reflect the pattern set by a larger bargaining un within the same organization. In addition, the exclusive functi reserved to the employer under section 18(1) of the Crown Employees' Collective Bargaining Act appear to us to be sufficie broad to allow the government to exercise its responsibilities in the areas of patient and institutional care levels. Having rega to the foregoing it is our recommendation that these government employed physicians be given the same scope for collective bargai ing as government employees under the Crown Employees' Collectiv

Bargaining Act.

24. Having regard to all of the foregoing our recommendations, which are broadly framed in order to allow some flexibility with respect to the specifics, are as follows:

1. that the bargaining unit be defined to include either all government-employed psychiatrists, physicians and dentists employed at its psychiatric hospitals and mental retardation facilities or these employees and in addition all other government-employed physicians, whether within the classified or the unclassified service;

2. that an independent body such as the Ontario Labour Relations Board or the Public Service Labour Relations Tribunal be given authority to determine whether the organization seeking to represent those in the bargaining unit satisfy the usual requirements with respect to status to represent and majority support;

3. that the subject matters for bargaining be as stipulated under the Crown Employees' Collective Bargaining Act;

4. that the final method of dispute resolution with respect to the bargainable matters referred to above be a system of binding arbitration which has as its primary features:

   (i) a tripartite board composed of one representative from each side with a neutral chairperson selected by agreement between the two nominees, failing which the neutral chairperson shall be appointed by the Chief Justice of Ontario;

(ii) that the proceedings be conducted under The Arbitrations Act R.S.O. 1980, c. 25;

(iii) that the proceedings be conducted within a stipulated time period;

(iv) that the decision of the majority be the decision of the Board but if there is no majority the decision of the chairperson be the decision of the Board;

(v) that each party assume its own costs and share equally the fees and expenses charged by the chairperson;

(vi) that the terms and conditions of employment continue in effect pending an answer.

I will remain seized in the event either party wishes to seek clarification of this report.

All of which is respectfully submitted.

DATED at Toronto the 27th day of November, 1986.

Chairman

I concur "Chris Paliare"
Association Nominee

In the matter of a Concilation Board hearing

Between: The Government of Ontario

And: The Ontario Psychiatric Hospitals and Hospital Schools Medical Staff Association.

Recommendations of Board Member P.C.Burnet

I do not accept that the imposition of the traditional union collective bargaining structure on the small and distinct group of professionals here involved is the most suitable solution to their problems, nor to the promotion of a stable and progressive employee relations environment between the Government and its professional employees. My reasons and alternative recommendations are as follows:

First, the scope of bargaining that would be either legally or practically feasible would be so narrow, relative to traditional trade union practice as to seriously call into question the applicability of that model to this group of professionals. Specifically, as noted by my colleagues, any bargaining structure that might be contemplated could not presently encompass the responsibility of the Government to manage, as defined in the Crown Employees Collective Bargaining Act. This would exclude, among other matters, "(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and location of equipment and classification of positions, and (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining

agent--"

Moreover, the practical scope of bargaining would be further confined by considerations of equity between various groups of employees within the public service, as well as considerations of cost and administrative efficiency. It is unquestionable that employee relations policies and benefits should be applied to like groups across the public service in a uniform and non-discriminatory fashion, and the responsibility for this falls squarely on the Government as employer. That responsibility cannot be discharged if the physicians and psychiatrists have the power, through binding arbitration to "cut their own deal" in respect of such usually bargainable matters as vacations, health and medical benefits, life insurance, sick leave entitlement, maternity leave, redundancy terms and similar conditions of employment. Nor would any such potential deviations from general practice be confined to this group, since lawyers, accountants, engineers, economists and any other professional group would have an equal and irresistable claim to similar determination of their conditions by outside parties on demand. To permit a multiplicity of practices to develop across the public service through a system of bargaing and binding arbitration would be neither equitable to employees or taxpayers, nor in the long run, conducive to stable and harmonious employee relations. It is an approach with the potential to create more problems in the future than the one it professes to solve in the present.

Nor is it correct, in my view, to assume that the various employ-

ment conditions for the various professional groups would follow a general pattern of uniformity if subject to binding arbitration. The very purpose of the proposal would seem to be to be to depart from the general pattern--otherwise, why have it?

Primarily for these reasons I do not think that the traditional collective bargaining model, capped by binding arbitration is appropriate. That is not to say that tha Association and others like it should be deprived of any voice in these matters. The full range of employment conditions can and should be allowed as proper subjects for discussion and consultation, and employee views and recommendations sought as to the adequacy of current arrangements and the preferred direction of future change --but they should not be permitted to become the occasion for a strike in this essential area, nor should their ultimate determination be taken out of the hands of the responsible government.

Moreover,in addition to the difficulties and ramifications of broad-based bargaining and arbitration, one can legitimately ask if that is the sole route to the achievment of a reasonable accomodation of the needs of Government and the aspirations of the physicians in the employment relationship. I think it is incumbent on the parties to further examine the shortcomings of the existing process and of all possible alternatives before concluding that the problems of their relationship are so intractable that they must be delegated to a third party for resolution. And the place to start is the issue of compensation.

While the issue of compensation is not the sole matter of concern

to the parties, it is probably the major, and recurring, one. If the parties were able to develop a process for reaching agreement on that basic matter, it is likely--or at least more likely- that they could do likewise on the other issues set forth in this Boards' mandate. It follows that priority attention should be directed to the process of compensation determination, before the lesser, albeit important, issues are tackled.

Isuggest that their are two vital requirements for a viable compensation determination process for this group. The first is the establishment of a detailed and comprehensive, mutually acceptable policy objective, and procedures for accomplishing it; and second, an independent audit procedure on request of either party to measure compliance and where there is a shortfall, to provide a further base for the parties to correct it. The following sketches the major components of such a process, which is not intended as a full blueprint but only a conceptual outline for development and refinement by the parties themselves.

1. It should be acceptable to both parties that neither should be expected to subsidize the other in regard to compensation levels. The Government on its part should expect to compensate in step with the competitive private market for the profession if it is to attract and retain competent staff, and it should not undercut that level because of actual or potential impact on relationships with other professional groups. Similarly, theAssociation must accept that it is reasonably entitled to compensation consistent with their professional market--but they should not expect to lead or exceed that market, nor to look to the rates of other government professionals to justify

rates in excess of their market sector. Accordingly, the Government should develop such a statement of compensation for all physicians employed by it, specifically affirming that the general policy will be to establish a total compensation level that will be competitive with the compensation earned by physicians of comparable skill and experience in the private sector; and providing further, the detailed procedures and standards by which this policy will be implemented.

2. Categories or classifications of employees should be defined and described according to specialty, years of required training and experience and other pertinent factors, for all employees, including contract employees.

3. The private sector should be defined to include full-time physicians employed by corporations and hospitals where there are counterpart classifications, as well as independent practising physicians

4. The comparison of compensation should take account of the value of benefits, such as vacations, pensions, insurance(life, health, disability, sick pay continuation)etc., as well as the costs of operation of offices in both sectors, all with a view to arrive at a net total comparative position.

5. Necessary data on earnings in each defined classification should be secured by the Government from O.H.I.P. on a non-identifiable basis, and private operational costs of offices on an estimated or typical sample basis. Likewise, the Association should provide on a non-identifiable basis, by audited statement, tax returns, or affidavit, an accurate statement of earnings derived by its members from private supplemental practice.

6. The system should basically be on a province-wide basis, but allow for regional differences or rural-urban differences where these are significant.

7. The studies of comparative compensation should be made at reasonable intervals, normally annually.

8. The control point of comparison should be the mean or average for each defined classification. Ranges should be built around such mid-points to accomodate newly-hired, experience levels, unusual work load, or hazard exposure etc., subject to the usual standards of administration and control as practised in most sophisticated salary systems.

9. These policies and procedures should be prepared by the Government, with full opportunity to the Association to discuss them and to formulate its views and recommendations prior to adoption and implementation, all with a view to establishing agreement on underlying principles and procedures. The Government should be responsible for administration, with appropriate data input from the Association. Such actuarial or cost accountancy expertise as is required should be paid by the Government and provided from mutually agreeable sources.

10. The Association should be entitled to full disclosure of the Governments' data and rationale, and if not satisfied that the policy and procedures have been properly applied, should be able to refer the matter to a Board of Review. The Board should be comprised of citizens of recognized stature and impartiality and should function as an audit group to assess compliance of any compensation decision with the established policy and

and procedure--but not to amend or depart from them. The Board would report its findings to the parties, with such recommendations as it considered necessary to secure compliance. The recommendations should be made public and would be intended as a base for further negotiations and settlement within the agreed framework. Strikes in this essential occupation should continue to be prohibited.

Given that the recommended format deals with the application of an explicit and quantifiable compensation policy, and is one which, even in the absence of a formal representative body, might well be followed as a matter of good employee relations, I see no compelling reason to impose the requirement of certification or the other appurtenances of trade union legislation on a professional association. The Government has already recognized it, as these proceedings attest, and the question of recognition, having been settled by the parties themselves is not at issue now and would not be under the suggested consultative format. The Government should be prepared to explain, consult and to take due account of employee opinion, even in the unlikely event that the Association had less than fifty percent as paid up members.

Finally, although the resolution of the compensation issue often has a salutary effect on the disposal of other issues, this would not necessarily follow and there remains the issues of work load secretarial assistance, workplace safety, educational leave, and legal representation, as well as a method of addressing work place concerns. While the approach recommended for the compensation issue is not readily transferable to some of these other areas, it does

contain a common requisite, being the development of general policy standards and a mutually agreed factual base on which to apply them and to direct the consultative process constructively. If the parties see fit to implement the compensation recommendations, I suggest that they themselves develop the most appropriate similar processes for other issues. A specific suggestion is that the parties consider the value of engaging in joint fact-finding on their own, and at the beginning of the annual or periodic review and not after discussions have broken down and positions hardened.

Where despite agreement on a framework of policy and procedure, disagreement persists on their implementation, I would recommend referral to an audit Board of Review on the same basis as earlier discussed. And, in the event that agreement is not reached on the framework itself, I would recommend that the differing proposals of the parties and their recommendations be submitted to a Board of Conciliation such as this, to make its public recommendations either as to process or as to the resolution of a specific case on the merits.